Supreme Court, U.S.
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No.
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

RONALD G. CALHOUN, PETITIONER

vs.

LILLENAS PUBLISHING

NAZARENE PUBLISHING BEACON HILL MUSIC, et al.

LIFEWAY CHRISTIAN RESOURCES
OF THE SOUTHERN BAPTIST
CONVENTION, f/k/a the Sunday School
Board of the Southern Baptist Convention,
d/b/a Lifeway Christian Stores,
CONVENTION PRESS, et al.
Defendants/Respondent

C.A. MUSIC, INC.

PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED FOR REVIEW

Is a plaintiff in a copyright infringement case entitled to a jury trial on the issue of whether his original protected work was copied by a defendant where the defendant's challenged work is shown to be strikingly similar to the plaintiff's original, or may such a defendant obtain judgment from the court as a matter of law, depriving the plaintiff of any jury trial, merely by claiming that the identical later work was independently created?

PARTIES TO THE PROCEEDING

1. Ronald G. Calhoun - Plaintiff/Petitioner

2. Lillenas Publishing - Defendant/Third-Party Plaintiff/Respondent

3. Nazarene Publishing House Beacon Hill Music - Defendant/Respondent

4. Lifeway Christian Resources of the Southern Baptist Convention, f/k/a The Sunday School Board of the Southern Baptist Convention, d/b/a Lifeway Christian Stores- Defendant/Respondent

5. Beacon Hill Music - Defendant/Respondent

6. Convention Press - Defendant/Respondent

7. Christian Artists Music, Inc. - Third Party Defendant/Respondent

8. The Southern Baptist Convention Lifeway Christian Resources, d/b/a Lifeway Christian Stores - Defendant/Cross Claimant/Respondent

9. The Sunday School Board of the Southern Baptist Convention Press - Defendant/Cross Claimant/Respondent

10. The United Methodist Publishing House - Defendant/Respondent

11. Cokesbury Publishing - Defendant/Respondent

12. Crystal Sea Recordings - Defendant/Respondent

13. Faith Music - Defendant/Respondent

14. Pilot Point Music - Defendant/Respondent

15. Psalmsinger Music - Defendant/Respondent

16. John Mathias - Defendant/Respondent

17. Hardy Weathers - Defendant/Respondent

18. Ken Bible - Defendant/Respondent

19. The Southern Baptist Convention - Defendant/Respondent

20. Broadman & Holman - Defendant/Respondent

21. Baptist Book Stores - Defendant/Respondent

22. Christian Copyright License International - Defendant/Respondent

23. World Music - Defendant/Respondent

24. Nelson/Word Ministry Services - Defendant/Respondent

25. Maranatha Music - Defendant/Respondent

26. Integrity Music - Defendant/Respondent

27. Integrity Church Services - Defendant/Respondent

28. Music Services - Defendant/Respondent

29. Cam Floria - Defendant/Respondent

30. Jeffrey Buchan - Defendant/Respondent

31. Robert McGee - Defendant/Respondent

Plaintiff/Petitioner is not aware of any parent corporations of publicly-held corporations which own 10% or more.

TABLE OF CONTENTS

Questions Presented for Review.....	I
Parties to the Proceeding.....	II
Table of Cited Authorities.....	VI
Citations of the Official and Unofficial Reports of Opinions and Orders Entered in this case.....	VII
Basis for Jurisdiction.....	1
Statutes Involved in this case.....	2
Statement of the case and Basis for Federal Jurisdiction in the District Court.....	3
Argument and Citations of Authority.....	6
Conclusion.....	15
Appendix 1.....	1a
Appendix 2.....	2a
Appendix 3.....	3a

TABLE OF CITED AUTHORITIES

Benson vs. Coca-Cola Company, 795 F. 2d 973 (11th Cir., 1986) 10

BTMC vs. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y., 1976)..... 14

Calhoun vs. Lillenas Publishing, 298 F. 3d 1228..... 5

Ferguson vs. National Broadcasting Co., Inc., 584 F. 2d 111, 113 (5th Circuit, 1978)..... 6, 10, 14

Gaste vs. Kaiserman, 863 F. 2d 1061, 1068 (2nd Cir., 1989)..... 7

Herzog vs. Castle Rock Entertainment, 193 F. 3d 1241, 1249 (11th Cir., 1999)..... 14

Keeler Brass Co. vs. Continental Brass Co., 862 F. 2d 1063 (4th Cir., 1988)..... 9

Miller vs. Universal Studios, 650 F. 2d 1365 (5th Cir., 1981)..... 8, 14

Peel & Company, Inc. vs. The Rug Market, 238 F. 3d 391 (5th Cir., 2001)..... 8

Repp & K&R Music, Inc. vs. Webber, 132 F. 3d 882 (2nd Cir., 1998)..... 6, 7,13, 14

Selle vs. Gibb, 741 F. 2d 896, 901 (7th Cir., 1984).....6, 10, 11, 12, 14

Three Boys Music Corp. vs. Bolton, 212 F. 3d 477 (9th Cir., 2000).... 9, 14

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

Calhoun vs. Lillenas Publishing, 298 F. 3d 1228 (11th Cir., 2002), 2002 Copr. L. Dec. P 28, 464, 63 V.S.P.Q. 2d 1687, 15 Fla. L. Weekly Fed. C 846

Calhoun vs. Nazarene Publishing House, No. 499-159; Calhoun vs. The Southern Baptist Convention, No. 400-086, (S.D. Ga., filed Feb. 20, 2001.)

IN THE SUPREME COURT OF THE UNITED STATES

RONALD G. CALHOUN
Plaintiff/Appellant

vs.

LILLENAS PUBLISHING
Defendant/Third-Party Plaintiff

NAZARENE PUBLISHING BEACON HILL MUSIC, et al.
Defendants/Appellees

LIFEWAY CHRISTIAN RESOURCES
OF THE SOUTHERN BAPTIST
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C.A. MUSIC, INC.
Third-Party Defendant/Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT

BASIS FOR JURISDICTION

This petition arises out of the Court of Appeals decision of July 23, 2002, affirming the trial court's grant of summary judgment in favor of the Defendants and against Plaintiff/Petitioner. Plaintiff/Petitioner's Motion for Rehearing was denied on September 5, 2002.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(a).

STATUTES INVOLVED IN THE CASE

17 U.S.C. §106, et seq.

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictoral, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Plaintiff/Petitioner Ronald G. Calhoun [hereinafter "Calhoun"], at the time an active Christian musical artist, wrote an original song, "Before His Eyes," in 1969. He copyrighted the work, and, in 1970, recorded it on a record album which was then released to the public for sale and distribution. At that time, Calhoun toured and performed at religious gatherings, churches and meetings on a regular basis. "Before His Eyes" was Calhoun's best original song, and was performed by him at virtually all of his shows. He performed the song at least 60 times in live concert performances. He sold some 1200 copies of his album containing the song at these shows. He sold copies of the sheet music to the song at the shows. He gave copies of the music to other soloists he worked with at such shows and programs. He also performed the song several times on T.V. and radio on gospel and Christian broadcasting programs, including from the Grand Ol' Opry gospel show out of Nashville. He also distributed copies of the sheet music and tapes of his song at the Wyman Theater, home of the Grand Ol' Opry, in Nashville. All of these performances, sales and distributions were during the years between 1970 and 1976.

Calhoun was also employed as a music instructor at the Stamps-Blackwood School of Gospel Music in Kentucky during this period, teaching students from all over the country, including Washington, and using his song and its sheet music as a teaching tool.

Of course, all of these performances, and sales, and broadcasts of all the T.V. and radio performances, were directed to Christian music audiences - that relatively small segment of the population which

follows and consumes that genre of music and entertainment.

At the same time Calhoun was so aggressively marketing his work, Robert McGee [hereinafter, "McGee"] was the associate pastor at The King's Temple Church in Seattle, Washington, a "musical church" (as it is described by all of the witnesses offering statements for McGee), where the leaders and members of the congregation would sing "original songs," rather than traditional hymns, at the church services. Thus, at the time Calhoun was performing his song for fans of original Christian music, McGee was working in a church with several hundreds of these very people, singing non-traditional Christian songs. Obviously, McGee had a reasonable opportunity to hear "Before His Eyes," either directly or from the many original Christian music devotees by whom he was surrounded every day.

On a Sunday morning in 1976, during church services at The King's Temple Church, McGee sang the melody of the chorus of "Before His Eyes," substituting verses from scripture for the original lyrics. McGee claimed that the melody he sang was spontaneously created by him, and named it "Emmanuel." McGee claims that he was "inspired," and that the melody "just literally popped into my head," with no writing, practice, composition or construction at all. McGee was not a sophisticated musician or songwriter, lacking even the ability to write down the melody of "Emmanuel" after he sang it, and lacking the ability to transpose the song to another key.

Nevertheless, McGee copyrighted the melody of "Emmanuel" in 1983.

Calhoun first discovered "Emmanuel," published in a hymnal and attributed to McGee, in 1997. In 1999, Calhoun filed the present action as a *pro se* complaint in the Southern District of Georgia.

Additional defendants were added by a second complaint filed in March of 2000, and both actions were consolidated into the present case. Subject matter jurisdiction of the District Court was based upon 28 U.S.C. §1338(a), addressing civil copyright claims.

The District Court granted summary judgment to the Defendants, on the ground that Calhoun had not shown that "Before His Eyes," his original work, and "Emmanuel," McGee's subsequent work, were substantially similar, an important element of a copyright infringement claim. Calhoun vs. Nazarene Publishing House, No. 499-159 (S.D. Ga., filed Feb. 20, 2001).

Calhoun appealed the summary judgment order to the Eleventh Circuit Court of Appeals. That Court expressly found that the two works were not only strikingly similar, but, "practically identical." Calhoun vs. Lillenas Publishing, 298 F. 3d 1228, 1232 (11th Cir., 2002). Despite this finding of striking similarity, the Eleventh Circuit affirmed the summary judgment order of the District Court on different grounds, finding that McGee's claim that he independently created "Emmanuel," without copying "Before His Eyes," eliminated all questions of material fact in the case, and barred Calhoun's copyright claims.

This case raises the question of whether subjective declarations by an alleged copyright violator that his subsequent work was independently created, despite its striking similarity to the earlier copyrighted work of a plaintiff, requires judgment for the alleged violator as a matter of law, eliminating all questions of material fact. Clearly, such declarations should not absolutely preclude a copyright violation claim, and the Eleventh Circuit erred in adopting such a rule in the present case.

ARGUMENT AND CITATION OF AUTHORITY

The Writ of Certiorari should be granted in this case, as the Eleventh Circuit in this action has decided an important question of federal law that has not been, but should be, settled by this Court. Further, the decision by the Eleventh Circuit in this case, finding that the subjective declarations of an alleged copyright violator eliminate all questions of fact, entitling the alleged violator to judgment as a matter of law, is in conflict with the decisions of other circuit courts on this question. This question is an important one which should be addressed by this Court, as the federal courts have exclusive jurisdiction over disputes regarding alleged copyright violations, and this Court is the ultimate authority on these matters. Further, in our present age of virtually universal access to all original work, future copyright violation disputes will be determined almost exclusively on the issue of independent creation or not. Accordingly, this Court should grant Certiorari in this case so that the conflict among the circuits over this important question, which is certainly likely to recur frequently, can be settled.

Copyright cases from all circuits universally agree that where, as here, the challenged subsequent work is "strikingly similar" to the earlier copyrighted work, a prima facie case has been made that the Defendant copied the Plaintiff's earlier work. See, e.g., Ferguson vs. National Broadcasting Company, Inc., 584 F. 2d 111, 113 (5th Cir., 1978); Selle vs. Gibb, 741 F. 2d 896, 901 (7th Cir., 1984); Repp & K&R Music, Inc. vs. Webber, 132 F. 3d 882 (2nd Cir., 1998). In such a case, the copyright infringement case defendant may still put forward his evidence of independent creation in an attempt to rebut this presumption. "The jury is only permitted to infer access from striking similarity; it need not do so."

Gaste vs. Kaiserman, 863 F. 2d 1061, 1068 (2nd Cir., 1989) (emphasis in original). In the present case, the Eleventh Circuit held that the Defendants' evidence of independent creation defeated Calhoun's claim as a matter of law, rather than rebutting the presumption of copying, so as to create a question for the fact finder. An examination of circuit court opinions on this issue shows that the majority of cases, and the better reasoned decisions, hold that a defendant's evidence of independent creation meets a plaintiff's prima facie case to create a question for the fact finder on the ultimate issue of copyright violation, and does not end the plaintiff's case as a matter of law.

The case of Repp & K&R Music, Inc. vs. Webber, 132 F. 3d 882 (2nd Cir., 1998) addressed this question directly. Defendant Andrew Lloyd Webber introduced affidavits from himself and his wife, stating that he wrote the challenged song in his home, with his wife. The Second Circuit Court reversed the trial court's summary judgment for Webber, holding that, where there is evidence that the challenged song is strikingly similar to the plaintiff's work, such evidence by the defendant of independent creation creates a factual issue for determination by the fact finder, and not a matter of law for decision by the Court. The appellate court disagreed with the trial court's apparent "opinion that some direct evidence was required to contradict [the defendant's] version of the events surrounding the beginnings of the ... [s]ong." 132 F. 3d 882, 891 (2nd Cir., 1998). The Circuit Court continued:

> Here again, the district court erred by undertaking the resolution of a disputed issue of material fact... The plaintiffs here have established a prima facie case of access through striking similarity, which certainly

> includes the element of probative similarity. Whether the evidence of independent creation here is sufficient to rebut the prima facie case established in this action is a question for the fact finder, whatever the contours of the burden of establishing the defense. Id.

While acknowledging that the comment "may well overstate the proposition," the Court also quoted from 2 Paul Goldstein, Copyright: Principles, Law and Practice §7.2.2 (1989), "Proof of independent creation, whether direct or circumstantial, should be taken with a grain of salt."

In Miller vs. Universal Studios, 650 F. 2d 1365 (5th Cir., 1981), the Fifth Circuit Court found a fact question on the issue of independent creation, which was answered by the jury in favor of the plaintiff. The defendant did meet the plaintiff's prima facie case of copying with evidence of independent creation, but that evidence simply presented an issue for the fact finder to decide. The plaintiff does retain the burden of proof on those issues, but the determination of whether that burden has been met is for the fact finder, and not the court.

A later case by the Fifth Circuit Court reached the same decision. In Peel & Company, Inc. vs. The Rug Market, 238 F. 3d 391 (5th Cir., 2001), the Fifth Circuit reversed the District Court's grant of summary judgment to the defendant in a copyright infringement case, rejecting the holding that the defendant's evidence of independent creation entitled it to summary judgment. The Court concluded, "Rug Market did present some evidence of independent creation... We do not view the evidence Rug Market presented as adequate to support a holding as a matter of law that the [disputed rug] was

independently created; rather, a genuine question of material fact remains on this issue, which we also leave for the fact finder." 238 F. 3d 391, 398.

In Keeler Brass Co. vs. Continental Brass Co., 862 F. 2d 1063 (4th Cir., 1988), the Fourth Circuit Court dealt directly with the effect of a defendant introducing evidence of independent creation after a plaintiff has made a prima facie case of infringement. That Court held that, where such evidence is introduced, the plaintiff has the burden of proof to show copying by the defendant, but the question of whether he has met that burden is for the finder of fact. Id., p 1066.

The Ninth Circuit Court of Appeals reached the same conclusion in Three Boys Music Corporation vs. Bolton, 212 F. 3d 477 (9th Cir., 2000). There, the Ninth Circuit let stand a jury decision in favor of the plaintiff's action, despite the declarations from the defendants of independent creation. The Ninth Circuit concluded that a reasonable juror could reject the defendants' testimony, and find actual copying despite the defendants' claims of independent creation. 212 F. 3d 477, 486.

Clearly, the decision of the Eleventh Circuit Court in the present case is in conflict with these decisions of the other circuits which have considered this question. Here, McGee's claim that he was "inspired" to sing, full blown, a melody written and copyrighted by Calhoun seven years previously was held sufficient to require judgment against Calhoun on the merits, as a matter of law. The cases cited by the Eleventh Circuit Court in support of its ruling do not hold that a question for the fact finder is eliminated in a case involving strikingly similar works where the defendant presents some evidence of independent creation. In fact, the cases cited by the Eleventh Circuit in favor of its decision did not involve strikingly similar works. This distinction is crucial, as

the striking similarity of the works is what creates the prima facie case to be met by a defendant's evidence of independent creation.

The Eleventh Circuit relied upon the case of Benson vs. Coca Cola Company, 795 F. 2d 973 (11th Cir., 1986). In that case, the Court expressly found that a showing of "striking similarity" had not been made by the plaintiff.

The Eleventh Circuit decision also cites the case of Ferguson vs. National Broadcasting Company, Inc., 584 F. 2d 111 (5th Cir., 1978). However, that case specifically found that the plaintiff presented no evidence of similarity of the two works, other than the two works, themselves. Ferguson vs. NBC, *supra*, held that the plaintiff's assertions were not probative evidence, and held there was no question of fact as to whether the two compositions were "strikingly similar." 584 F. 2d 111, 113, 114. Clearly, that case does not stand for the proposition that a defendant's bare assertions of independent creation are sufficient to dismiss a plaintiff's copyright infringement claim as a matter of law.

The circuit court decision which comes closest to supporting the ruling of the Eleventh Circuit Court in the present case is Selle vs. Gibb, 741 F. 2d 896 (7th Cir., 1984). That Court concluded that the plaintiff's work and the subsequent work allegedly written by the Bee Gees were not "strikingly similar," and based its decision on that finding, so the case is not directly on point. However, the Seventh Circuit decision got to that point by analyzing the complete lack of evidence from the plaintiff raising any reasonable possibility of access by the defendants to the plaintiff's earlier copyrighted work, and the lack of any argument regarding the defendants' subsequent independent creation of their work, which was documented on tape in a recording studio. Selle vs. Gibb, *supra*, provides a clear explanation of why evidence of access is

significant even in a case where striking similarity is found. The Court recognized that a showing of striking similarity allows a presumption of access without other evidence. However, it also recognized the possibility, however unlikely, of independent creation of the same work by two artists. The Seventh Circuit addressed that unacceptable result by requiring that, in addition to a showing of striking similarity, "there must be at least some other evidence which would establish a reasonable possibility that the complaining work was available to the alleged infringer." Id., p. 901. The 7th Circuit Court continued, "Thus, although proof of striking similarity may permit an inference of access, the plaintiff must still meet some minimal threshold of proof which demonstrates that the inference of access is reasonable." Id., at 902.

The Selle, *supra*, court adopted an analysis by which the amount of evidence of access required to make out a plaintiff's prima facie case varies depending upon the degree of similarity of the two works at issue. Id., p. 903. Where, as here, the defendant's challenged work is "practically identical" to the plaintiff's earlier copyrighted work, only minimal showing of access is necessary to satisfy this requirement. Petitioner suggests to this Court that this analysis provides a proper way to evaluate such cases.

The Eleventh Circuit Court's decision in this case examined the evidence of access in its analysis of the issue of independent creation, but, given the striking similarity between the two works in this case, it set much too high a burden for Calhoun on this issue. Access is not an element of Calhoun's case which he must satisfy to establish a prima facie case. Access is presumed from the striking similarity of the infringing work. Rather, Calhoun need only show sufficient evidence on that issue "to meet some

minimal threshold of proof which demonstrates that the inference of access is reasonable." Id. A "possibility" that the work was "available" is sufficient to justify the inference.

As shown, virtually every copyright decision from all circuits recites the rule that a showing of striking similarity alone, without other evidence, can satisfy a plaintiff's requirement for proof of access. Obviously, if the scrutiny given to evidence of access is the same even where a showing of striking similarity is made, all of that language in all of those cases is completely meaningless. Rather, the proof of access required after a showing of striking similarity is only that "minimum threshold of proof" described in Selle vs. Gibb, *supra*. The Eleventh Circuit applied an incorrect standard to reach its decision on the effect of the Defendants' evidence of "independent creation."

The facts set out in the Statement of the Case, above, demonstrate the required "minimum threshold of proof," a possibility that the work was available to McGee. By adopting a much higher requirement of access as a part of its discussion of the likelihood of independent creation, the Eleventh Circuit in this case created a new, and extremely harsh, standard for copyright infringement plaintiffs not found in other circuits.

The question is not whether Calhoun's evidence of access and copying is persuasive or compelling. The question is whether it is sufficient to allow the presumption of access to go to the jury, with all of the evidence, to decide the issue. By considering the evidence of access under much too harsh a standard, the Eleventh Circuit Court removed a contested issue of fact from the fact finder.

The Eleventh Circuit decided this case on its finding that McGee's evidence of independent creation eliminated any question for the jury on that issue. As shown above, there appear to be no cases from other

circuits where, as here, a showing of striking similarity was made, but the issue of independent creation was decided against the plaintiff as a matter of law based upon the defendant's claim of independent creation. As also shown, the decisions of other circuits, such as Repp vs. Webber, 132 F. 3d 882 (2nd Cir., 1998), expressly hold that such testimony by a defendant leaves the question for the fact finder, and not the court. The facts of this case demonstrate amply that here, too, the question of independent creation is one which should be answered by the fact finder and not by the court.

As shown, by definition, a finding of striking similarity establishes that two works are so similar as to preclude the reasonable possibility of independent creation. That finding has been made here. The Defendants may rebut that presumption with evidence of McGee's alleged independent creation, but the question of whether they have done so successfully should be for the fact finder, and not the court. In all circuits besides the Eleventh, it would be.

There is considerable other evidence in the record of this case raising questions about the credibility of the Defendants' independent creation evidence. McGee's affidavit in this case states that "Emmanuel" simply burst from his lips, full-blown, in church one Sunday, with no writing, practice or construction at all. Thus, no one saw him write it; they simply heard him sing it. The only evidence that he created it is his own self-serving testimony. The Court in Repp vs. Webber, *supra*, noted the inherent credibility problems with this kind of evidence, and found a jury question on the issue of independent creation.

The very fact that "Emmanuel" popped out of McGee without any process of construction makes it much more likely that he was repeating, consciously or not, a melody he had already heard, rather than

composing a new work[1]. Many cases have noted the relevance of the creative process, and the length of time it took, in evaluating evidence of independent creation. See, e.g., Three Boys Music Corp. vs. Bolton, 212 F. 3d 477 (9th Cir., 2000); Miller vs. Universal Studios, 650 F. 2d 1365 (5th Cir., 1981); Selle vs. Gibb, 741 F. 2d 896 (7th Cir., 1984); Herzog vs. Castle Rock Entertainment, 193 F. 3d 1241 (11th Cir., 1999).

McGee's lack of sophistication as a musician and songwriter also casts doubt upon his claim to have spontaneously burst forth independently with a song identical to that written by Calhoun seven years earlier. His statement establishes that he had to get the church music director to write down "Emmanuel" after he sang it, and that he, himself lacked even the ability to transpose the song to another key. Courts considering the question of independent creation have considered the creative capability of the defendant as a relevant factor. See Selle vs. Gibbs, *supra*. (Bee Gees had composed over 160 songs); Ferguson vs. National Broadcasting Co., *supra*, (John Williams had previously composed many important film scores and won an Academy Award); Herzog vs. Castle Rock Entertainment, *supra*, (John Sayles was critically acclaimed screenwriter and director, with an Academy Award nomination). The evidence in this case suggests it would be quite remarkable for the untrained McGee instantly to compose a now-popular melody without exposure to Calhoun's existing identical work.

The Eleventh Circuit opinion emphasized the fact that McGee burst forth with "Emmanuel" without any lead sheets or sheet music. The lack of written music that Sunday morning is not evidence of

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[1] Copyright infringement liability exists even where the copying is subconscious or innocent. See Repp vs. Webber, *supra*; BTMC vs. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y., 1976).

independent creation. McGee could as easily have sung "Happy Birthday," or "Jesus Loves Me," without sheet music, but he certainly did not write those songs. A melody, once heard, can be carried in one's head and reproduced later, with or without written notes. For this reason, the statements of other church members who saw McGee sing the song add nothing to his own self-serving statements.

As noted before, the timing of the alleged creation of "Emmanuel" also makes the possibility of independent creation less likely. Calhoun was actively promoting "Before His Eyes" to audiences interested in original Christian music during the several years immediately prior to McGee's alleged creation. McGee is among those people most likely to have heard "Before His Eyes," given his profession and his employment in a "music church," and "Emmanuel" was first sung by him at the time he would have been most likely to have heard it.

Clearly, this evidence would be sufficient to raise a fact issue for the jury on the Defendants' claim of independent creation under the rules applied in any other circuit, and those rules properly resist blind acceptance of the self-serving declarations of an alleged copyright infringer. The burden would remain on Calhoun to overcome the evidence of spontaneous creation, but the fact finder in this case should hear all of the evidence and make that decision, rather than allowing McGee's statements to end the dispute as a matter of law.

CONCLUSION

It has been shown that other circuits which have considered this question, including the Second, Fourth, Fifth and Ninth Circuits, have all held that, where an alleged copyright infringing subsequent work is strikingly similar to the original copyrighted work, declarations of independent creation by the alleged

infringing defendant serve only to create a question for the fact finder as to whether the plaintiff has carried his burden of proof to demonstrate copying of his work. Such declarations do not establish, as a matter of law, that the plaintiff's claim is without merit. The Eleventh Circuit in the present case has established this harsh and undesirable rule, in conflict with the other circuit courts which have considered the question. Accordingly, this Court should issue a Writ of Certiorari to review this case, and resolve the dispute between the circuits, and to answer this important question, which surely will continue to arise again in the future.

Respectfully submitted, this 21ST day of March, 2002.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.01-11413

D. C. Docket No.99-00159 C

Filed
U.S. Court of
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July 23,
2002
Thomas K.
Kahn, Clerk

RONALD G. CALHOUN,

Plaintiff- Appellant,

versus

LILLENAS PUBLISHING,

Defendant-Third-
Party Plaintiff,

NAZARENE PUBLISHING
BEACON HILL MUSIC, et al.,

Defendants-
Appellees,

LIFEWAY CHRISTIAN RESOURCES
OF THE SOUTHERN BAPTIST CONVENTION,
f.k.a. the Sunday School Board of the Southern
Baptist Convention, d.b.a. Lifeway Christian Stores,
CONVENTION PRESS, et al.,

Defendants-
Appellees,

C.A. MUSIC, INC.,

Third-Party-
Defendant-Appellee.

No.01-11415

D. C. Docket No.00-00086 CV -4

RONALD G. CALHOUN,

Plaintiff- Appellant,

versus

THE SOUTHERN BAPTIST CONVENTION LIFEWAY CHRISTIAN RESOURCES, d.b.a Lifeway Christian Stores, THE SUNDAY SCHOOL BOARD OF THE SOUTHERN BAPTIST CONVENTION, et al.,

Defendants-Cross Claimants- Appellees

THE UNITED METHODIST PUBLISHING HOUSE, COKESBURY PUBLISHING, et al.,

Defendants- Appellee:

Appeals from the United States District Court for the Southern District of Georgia

(July 23,2002)

Before BIRCH, CARNES and COX, Circuit Judges.
PER CURIAM:

This consolidated appeal arises out ofa putative copyright infringement action. In his pro se action, the gravamen of which focuses upon ownership of a musical work, Ronald Calhoun appeals the district court's grant of summary judgment in favor of Lillenas Publishing Company, Nazarene Publishing House, Beacon Hill Music, Crystal Sea Recordings, Faith Music, Pilot Point Music, Psalmsinger Music, Zondervan Publishing House, John Mathias, Hardy Weathers: and Ken Bible[1], docketed as our case No.01-11413, and The Southern Baptist Convention, Lifeway Christian Resources, The Sunday School Board of the Southern Baptist Convention Press, Broadman & Holman, Baptist Book Stores, The United Methodist Publishing House, Cokesbury Stores, Christian Copyright License International, World Music, Nelson/Word Ministry Services, Maranatha Music, Integrity Music, Integrity Church Services, Music Services, Christian Artist Music (C.A. Music), Cam Floria, Jeffery Buchan, and Bob McGee (hereinafter collectively referred to as "McGee/ Assigns"), docketed as our case No.01-11415. The district court found that Calhoun had no claim for copyright infringement because there was insufficient evidence to show that (1) McGee had access to Calhoun's song "Before His Eyes," and (2) McGee's chorus "Emmanuel" was strikingly similar to "Before His Eyes." We AFFIRM the district court's judgment,

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[1] I The district court granted Calhoun ' s motion to dismiss Zondervan Publishing House
from the action. Additionally, the court granted Lillenas peffi1issionto add C.A. Music, Inc. as a third-party defendant.

albeit upon another basis.[2] We conclude that the evidence compels the conclusion that Calhoun's copyright claims should be barred by McGee/Assigns' claim of independent creation.[3]

I. BACKGROUND

Calhoun wrote the song "Before His Eyes" in 1969.[4] He recorded an album containing "Before His Eyes" on the Charisma record label in 1970, and it was subsequently released to the public for sale and distribution. Calhoun has no records of any royalties from the album.

In March of 1971, Calhoun received a writer's clearance of his composition stamped and registered with the licensing performance agency Broadcast Music Incorporated ("BMI"). BMI cleared and announced the work in their forthcoming bulletins to stations. Calhoun promoted and performed this musical work by means of concerts, and performances in churches, and on television and radio. However, the total amount of royalties Calhoun has received to date is $11.

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[2] We may affirm the district court on different grounds as long as "the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Ochran v. United States, 273 F.3d 1315,1318 (11th Cir. 2001) (citation omitted).

[3] It should be emphasized that independent creation is *not* an affirmative defense (i.e., a claim extraneous to the plaintiffs prima facie case). Rather, independent creation attempts to prove the opposite of the Calhoun's primary claim, i.e., copying by McGee. Keeler Brass Co. v. Continental Brass Co., 862 F.2d 1063, 1066 (4th Cir. 1988).

[4] 4 He distributed publication ofhis musical work in 1970 and inserted and inscribed the copyright notice to the distributed publication in accordance with the Copyright Act of 1909, § 19. Calhoun eventually filed for registration for his claim of copyright in "Before His Eyes" in 1990.

In 1976, Robert McGee, then an associate pastor at The King's Temple Church[5] in Seattle, Washington, wrote the chorus "Emmanuel." The chorus first appeared in a collection of 11 choruses entitled Choruses From The King's Temple, 1976 Book I and was used by the church in their worship services. In 1983, C.A. Music, Inc. acquired the copyright in "Emmanuel" and licensed the song to dozens of companies. To ensure proper title to the copyright in "Emmanuel," C.A. Music acquired several affidavits from eye witnesses who testified that they watched McGee independently create the song. R3-69-3. Since then, "Emmanuel" has appeared in a number of Christian denomination hymnals, and has been translated into dozens of foreign languages. For much of the 1980s and 1990s, it was ranked in the top 20 requested songs rated by Christian Copyright Licensing, Inc., a copyright clearinghouse company that monitors and reports licensing transactions for Christian music.

From 1989 until 1998, Calhoun was a part-time organist at a United Methodist Church. As an organist, he played for choir rehearsals three times a week and played from hymnals which included "Emmanuel." He admits to using these hymnals, but Calhoun contends that he did not discover "Emmanuel" until 1997.

On 19 July 1999, Calhoun filed a pro se complaint for copyright infringement in the Southern District of Georgia against various publishing houses and record labels. Calhoun alleged that the chorus "Emmanuel" was based on the chorus section of "Before His Eyes," and that McGee/Assigns published, marketed, promoted, and distributed the alleged

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[5] The King's Temple Church is now the New Beginnings Church.

infringing work without Calhoun's permission. Calhoun filed a second complaint on 30 March 2000 against various publishing houses, churches and Christian book stores. The district court consolidated both actions, noting that the claims were identical.

McGee/Assigns moved for summary judgment arguing that McGee independently created and had no reasonable access to "Before His Eyes" when he created "Emmanuel." They further argued that "Emmanuel" was not substantially similar to "Before His Eyes" because the lyrics, cord progressions, and keys of the two compositions were different. Additionally, McGee/Assigns asserted that McGee's action was barred by the three-year statute of limitations and the equitable doctrine of laches, due to his long delay in filing suit.

Calhoun responded by asserting that McGee had access to "Before His Eyes" because it was promoted at concerts, churches, television, and radio stations. Further, he contended that the two works were strikingly similar and that the delay and laches arguments were without merit because he first discovered the alleged infringement in 1997, within the three-year statute of limitations for filing this action.

The district court granted McGee/Assigns' motion for summary judgment finding that there was insufficient evidence to show both access and striking similarity. The district court did not alternatively consider McGee/Assigns' statute of limitations, delay, and laches arguments. Calhoun filed a timely appeal of the judgment.

II. DISCUSSION

We review a district court's grant of summary judgment de novo, apply the same standard as the district court, and review all facts and reasonable inferences in light most favorable to the nonmoving party. Allison v. McGhan Med. Corp., 184 F.3d 1300,

1306 (llth Cir. 1999). Summary judgment is proper when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c).

Two elements must be proven in order to establish a prima facie claim for copyright infringement: (1) that Calhoun owns a valid copyright in "Before His Eyes," and (2) that McGee copied "constituent elements of the copyrighted work that are original." Feist Publications. Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). To establish copying, Calhoun must show that McGee had access to "Before His Eyes," and that "Emmanuel" is so substantially similar to "Before His. Eyes" that "an average lay observer would recognize the alleged copy as having been appropriated from the original work."[6] Original Appalachian Artworks. Inc. v. Toy Loft, 684 F.2d 821,829 (11the Cir. 1982), (citation omitted). "Proof of access and substantial similarity raises only a presumption of copying which may be rebutted by [McGee/Assigns] with evidence of independent creation."[7] Id.

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[6] Where a plaintiff cannot demonstrate access he may, nonetheless, establish copying by demonstrating that his original work and the putative infringing work are strikingly similar. See Herzog v. Castle Rock Entertainment, 193 F.3d 1241, 1249 (11th Cir. 1999); Benson v. Coca Cola Co., 795 F.2d 973, 975 n.2 (11th Cir. 1986) (en banc); Ferguson v. National Broadcasting Co., 584 F.2d 111, 113 (5th Cir. 1978).

[7] Music is often the milieu in which the copyright concepts of "strikingly similar" and "independent creation" have been involved. ~ Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) (plaintiff failed to show that musical group Bee Gees had access to plaintiffs song "Let It End" before they composed *"How* Deep Is Your Love"); Benson, 795 F.2d at 975 (song "I'd Like to Buy the World a Coke" was an independent creation and did not infringe copyright of song "Don't Cha

While McGee/ Assigns assert that the two simple melodies are not substantially similar, much less strikingly similar, even a casual comparison of the two compositions compels the conclusion that the two compositions are practically identical. Given the limited number of musical notes (as opposed to words in a language), the combination of those notes and their phrasing, it is not surprising that a simple composition of a short length might well be susceptible to original creation by more than one composer.[8] However, in the realm of copyright, identical expression does not necessarily constitute infringement.[9] Just as two paintings of the same object in nature may appear identical, the two paintings , origins may be of independent creation.[10]

Know"); Repp & K&R Music. Inc. v. Webber, 132 F.3d 822 (2nd Cir. 1997) (song "Till You" did not infringe copyright for song "Close Every Door"); Tisi v. Patrick, 97 F. Supp 2d 539 (S.D.N.Y. 2000) (composer failed to show (1) that performer had access to "Sell Your Soul" and (2) the necessary "striking similarity" between "Sell Your Soul" and "Take a Picture").

[8] This is particularly true in certain genres of music where familiar phrasing is present. Here the genre is church music. We are only dealing with a basic melody -not lyrics or harmonic background or accompaniment -here, only a short melody is at issue.

[9] 9 We have cautioned trial courts in this circuit "not to be swayed by the fact that two works embody similar or even identical ideas." Toy Loft, 684 F.2d at 829 n. II. See also MiTek Holdings. Inc. v. Arce Engineering Company. Inc., 89 F.3d 1548 (11th Cir. 1996) (competitor's copying of protectable elements of copyrighted computer programs was *de minimis* and not actionable); Bateman v. Mnemonics. Inc., 79 F.3d 1532 (llth Cir. 1996).

[10] Franklin Mint Corp. v. National Wildlife Art Exchange, Inc., 575 F2d 62 (3rd Cir. 1978) (while ideas in the two

McGee can fully negate any claim of infringement if he can prove that he independently created "Emmanuel." Benson v. Coca Cola Co., 795 F.2d 973, 975 (11th Cir. 1986) (en banc) ("testimony [of writers of allegedly infringing song] constitutes uncontradicted evidence of independent creation, fully negating any claim of infringement"). Once McGee offers evidence of independent creation, Calhoun has the burden of proving that McGee in fact copied "Before His Eyes." Miller v. Universal City Studios. Inc., 650 F.2d 1365, 1375 (5th Cir. 1981).

As the district court points out, McGee stated in his affidavit that he "independently created 'Emmanuel' during [a] church service in May or June 1976. [He] did not use any pre-existing material as a basis for the song. [He] did not use any sheet music, lead sheets or hymnals."' R3-116-21. Moreover, McGee provided affidavits of several witnesses who corroborate his independent creation of "Emmanuel" during a church service. R3-69-2. Calhoun did not

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paintings of cardinals involved were similar, the expressions were not, and thus, no copyright infringement); See also Leigh v. Warner Bros., 212 F.3d 1210, 1214 (11th Cir. 2000) (photographs of the same sculpture portraying the figure in the same pose, alone, did not give rise to infringement); Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600 (1st Cir. 1988); Selle, 741 F2d at 896 (stating that "two works may be identical in every detail, but, if the alleged infringer created the accused work independently or both works were copied from a common source in the public domain, then there is no infringement"); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971) (copying of expression was not barred where "idea" of a jeweled bee pin and the "expression" of the "idea" were inseparable); 3 Nummer, § 13.03[B][2][b] ("if the only original aspect of a work lies in its literal expression, then only a very close similarity, verging on the identical, will suffice to constitute an infringing copy.").

offer any evidence to contradict McGee's testimony. Therefore, the district court was correct in concluding evidence of independent creation, which fully negates any claim of infringement." R3-116-22.

Furthermore, the district court found that "Emmanuel" was independently created by McGee because he had no access or reasonable opportunity[11] to view "Before His Eyes." Calhoun provides three theories to attempt to establish McGee had access to view "Before His Eyes." First, Calhoun alleges that he taught students from the state of Washington while he was an instructor at the Stamps-Blackwood School of Gospel Music in Kentucky, and that these students procured and made his music available to McGee. R3-116-6. Calhoun provided seven names and addresses of students from the state of Washington that he taught in the summers from 1972 to 1976. The district court rioted that Calhoun did not indicate whether these seven students resided in Washington during the time period of 1972 to 1976, when he allegedly taught them. Furthermore, Calhoun did not offer any affidavits of these seven individuals to corroborate his allegations that they provided his music to McGee or anyone associated with the King's Temple Church. Nor did Calhoun proffer any evidence to rebut McGee's affidavits or declarations stating that he created "Emmanuel" without any sheet music or lead sheets. McGee wrote "Emmanuel" during a church service at the King's Temple Church in Seattle, Washington in the presence of eye witnesses who corroborate McGee's independent creation of the song. R3-69-2, ¶ 2.

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[11] Since evidence of actual viewing or knowledge of the copyrighted work is virtually impossible to prove, we regard access as a "reasonable opportunity to view" the copyrighted work. Herzog v. Castle Rock Entertainment, 193 F.3d 1241, 1249 (11th Cir. 1999).

Calhoun also argues that McGee heard "Before His Eyes" on the radio, television, or at a performance. He performed "Before His Eyes" on television three times. However, Calhoun offered no admissible evidence to show that these performances were aired outside of Atlanta and Portsmouth, Virginia.[12] The only evidence offered by Calhoun was a letter from the producer of *The* 700 *Club,* where Calhoun performed "Before His Eyes" on 6 October 1972. The letter explained that the *The* 700 *Club* was broadcast throughout the South, but, most notably, the letter did not indicate that the show was available in any part of the Pacific Northwest region of the country.

In addition, Calhoun contended that "Before His Eyes" was performed and promoted at concerts, in churches, to record labels, and over the radio, specifically over The Grand Ole Opry Gospel Radio, which was syndicated from Nashville, Tennessee. The only evidence that his song was accessible in the state of Washington was a letter that Calhoun provided from the Operations manager of WSM, the radio station that broadcasts The Grand Ole Opry Gospel Radio, that stated "[r]eception of WSM in Washington state, therefore, while possible from time to time, is not likely to have occurred in the 1970s on anything resembling a consistent basis." R3-116-8. Furthermore, Calhoun provided no evidence to refute McGee's testimony that he had "never seen nor heard the television program 'Warner Robbins Presents,' ...never seen the television program 'The 700 Club,'" nor had he "heard the radio program 'The Grand Ole' Opry Gospel Hour." Id. at 8-9

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[12] 12 Calhoun stated in a deposition that he did not know what television station were affiliates of the CBN network during the time of his performances.

As the district court points out, the evidence does not support Calhoun's claim that "Before His Eyes" received widespread publicity. Calhoun has only received $11 in performing rights and publishing royalties for "Before His Eyes." Furthermore, Calhoun has no records of any royalties received from the sale of his album "It's Through Our Faith," on which "Before His Eyes" appears.

Finally, Calhoun asserted that McGee had access to his work because he sent "Before His Eyes" to Faith Music Company, which Lillenas Publishing Company purchased around 1975. Calhoun argued that McGee had dealings with Lillenas, and that Lillenas' alleged possession of his song is sufficient to establish access. The district court found and the record supports that there was no connection between McGee and Lillenas. Calhoun did not offer any evidence to rebut McGee's statement that he "never had any relationship with any music publishers" prior to 1976. R3-116-13. Therefore, Calhoun cannot prove access based on this theory either. Thus, citing no evidentiary basis for access and acknowledging a strong and unrefuted evidentiary basis for McGee's claim of independent creation, the district court did not err in entering judgment against Calhoun.

III. CONCLUSION

These consolidated cases involve the appeal of a grant of summary judgment in which the district court held that there was insufficient evidence to show that "Emmanuel" was strikingly similar to "Before His Eyes," and therefore, Calhoun had no claim for copyright infringement. We conclude that there is no genuine issue of material fact about McGee independently creating "Emmanuel." Therefore, we AFFIRM the judgment of the district court, and conclude that Calhoun's claims of copyright

infringement should be barred by McGee's bona fide claim of independent creation.

BIRCH, Circuit Judge, specially concurring:

I concur. Moreover, because the confluence of facts in this case present a "perfect storm," I think it enticing, if not necessary, to address an alternative basis upon which the district court's judgment could be sustained ---unreasonable delay. Whether unreasonable delay may bar a claim of copyright infringement[1] where there is considerable delay in filing suit and a bona fide claim of independent creation exists is globally one of first impression and merits examination. I am persuaded that just as equitable tolling[2] may save an otherwise tardy infringement action, unreasonable delay should bar such an action where a bona fide independent creation claim is presented.[3]

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[1] Heretofore, courts have frequently considered delay in initiating an action where, as is typical, preliminary injunctive relief has been "requested. Essentially, where unreasonable delay has occurred, courts have concluded that such delay is suggestive of a lack of irreparable harm. See, e.g., Richard Feiner and Co., Inc. v. Turner Entertainment Co., MGM/UA, 98 F.3d 33 (2nd Cir. 1996); Tom Doherty Associates. Inc. v. Saban Entertainment 60 F.3d 27 (2d Cir. 1995); Forry. Inc. v. Neundorfer. Inc., 837 F.2d 259 (6th Cir. 1988); Markowitz Jewerlv Co., Inc. v. Chapal/Zenray. Inc., 988 F. Supp. 404 (S.D.N.Y. 1997); Fritz v. Arthur D. Little, Inc., 944 F.Supp. 95, 98 (D.Mass.1996).

[2] See Stone v. Williams, 970 F.2d 1043 (2d Cir. 1992); Taylor v. Meirick, 712 F.2d 112 (7th Cir. 1983); Prather v. Neva Paperbacks. Inc., 446 F.2d 338 (5th Cir. 1971); 3 Nimmer § 12.05[B].

[3] I stress that here I am not applying a laches analysis to an infringement action. Rather I analyze this unique case as essentially a declaratory judgment action, focusing on a

I conclude that the challenging author must not unreasonably delay in his assertion of copyright as to the other author's work where he seeks to have a judicial determination of the challenged author's originality of creation.[4] Failing to do so would

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musical composition that the first composer in time claims to be identical to the second composer's score when a bona fide claim of independent creation is asserted. The cases, heretofore existing, closest to this unusual case involve claims of putative co-authorship where one of the co-authors seeks a declaration of sole ownership. Thus my approach is closes to that taken by the Second Circuit in Merchant v. Levy, 92 F.3d 51, 57 n.8 (2d Cir. 1996) (a co authorship case where laches was not addressed, but a delay bar was imposed). Moreover, this avoids the need to embrace one side or the other in applying the laches defense.

The circuits are split on whether it is appropriate to consider a laches defense where an infringement action is brought within the statutory three-year period of limitations. See Stone v. Williams, 970 F.2d 1043, 1048 (2d Cir. 1992) (where uncertainty surrounded the relative's status of the author's family, the statue of limitations was not applied to defeat the copyright co-ownership claim of an author's relative accruing more than three years before the lawsuit); Lyons Partnership v. Morris Costumes, Inc., 243 F.3d 789, 797 (4th Cir. 2001) ("in connection with copyright claims, separation of powers principles dictate that an equitable timeliness rule adopted by courts cannot bar claims that are brought within the legislatively prescribed statute of limitations"); Danjaq LLC v. Sony Corporation, 263 F.3d 942, 954 (9th Cir. 2001) ("If a defendant can show harm from the delay, the court may, in extraordinary circumstances, defeat the claim based on laches, though the claim is within the analogous limitations period")(citation omitted). Perhaps the Court's opinion in Nat'l Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061, 2077, __U.S.__ (2002) will clarify that issue.

[4]A work is "original," and therefore accorded copyright protection, if it is independently created *by* the author and

constitute a manifest injustice and potentially unjust denial of the challenged author's constitutionally guaranteed copyright in his original (albeit later) work. The gravamen of Calhoun's lawsuit is that he claims ownership in "Emmanuel" because he contends the melodies are practically identical. I conclude that this claim and all those logically following therefrom should be barred, including any infringement claims. Such an approach is not without precedent or logic.[5]

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possesses some minimal degree of creativity. 17 U.S.C. § 101 et seq.

[5] See e.g., Merchant, 92 F.3d at 56 ("[w]e hold that plaintiffs claiming to be co-authors are time-barred three years after accrual of their claim from seeking a declaration of copyright co-ownership rights and remedies that would flow from such a declaration."); Danjaq LLC, 263 F.3d at 954 (upholding a district court's application of laches to prevent a plaintiff from pursuing copyright infringement claims when plaintiff filed suit "at least twenty-one years--and more likely, thirty-six years" after having knowledge of the potential claims); Margo v. Weiss, 213 F3d 55, 60-61 (2nd Cir. 2000); Zuill v. Shanahan, 80 F.3d 1366, 1371 (9th Cir. 1996) (barring "a declaratory judgment of co-ownership and the relief ancillary to such a claim"); New Era Publications Int'l v. Henry Holt & Co., 873 F.2d 576, 584-85 (2d Cir. 1989) (laches barred plaintiff from enjoining publication of author's biography when plaintiff delayed "unreasonabl[y] and inexcusabl[y]" in filing suit.); Fort Knox Music, Inc. v Baptiste, 47 F. Supp 2d 481, 483-84 (S.D.N.Y. 1999); 3 Nimmer § 12.05 [C], n.63 ("If *A* cannot be heard to claim belatedly that he co-authored a work with *B* 20 years ago, which would result in *A* owning 50% of the copyright, then all the more so *C* must be barred from belatedly claiming that she solely authored a work on which *D* has been claiming authorship credit for 20 years, which would result in *C* owning 100% of the copyright").

1. *Period of Delay*

The statute of limitations for copyright infringement claims is triggered by violations, that is, actual infringements. The limitations period may be triggered when a plaintiff knows or, in the exercise of reasonable diligence, should have known about an infringement. 17 U.S.C. § 507(b). One should look to the appropriate statute of limitations as a guide to determine whether the delay was reasonable. Kason Indus., Inc., 120 F.3d at 1203. The Copyright Act sets forth a three-year statute of limitations for claims of copyright infringement. 17 U.S.C. §507(b). Accordingly, one basis for determining whether Calhoun's delay in filing suit was reasonable is the three-year statute of limitations in §507(b).

Calhoun's period of delay ranges anywhere from 23 years, from the time that "Emmanuel" was written in 1976, to 13 years, from the time it was licensed to churches around the world in 1984. During this time Calhoun took no legal action to stop or to seek redress for the putative infringement. By any calculation, this delay is more than enough. See Freedom Savings and Loan Ass'n. v. Way, 757 F.2d 1176, 1186 fn. 8 (11th Cir. 1986) (five years delay in filing trademark infringement suit considered sufficient); Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 616 F.2d 1315, 1326 (5th Cir. 1980) (delay presumed unreasonable when exceeded the statutory six-year period). Applying the three-year benchmark, it is clear that Calhoun's delay of over a decade plainly constitutes a significant delay.

2. *Inexcusable Delay*

Next, the cause of the delay should be examined to determine whether Calhoun's lengthy delay in filing suit was excusable. Kason, 120 F.3d at 1204. Some examples of permissible delay, frequently viewed in the context of equitable tolling, among other circuits include: (1) the need for the exhaustion of remedies through the administrative process, Couveau v. American Airlines, Inc., 218 F.3d 1078, 1083-84 (9th Cir. 2000); (2) additional time to determine whether the scope of the proposed infringement will justify the cost of litigation, "Lotus Dev. Corp. v. Borland Int'l, Inc. 831 F. Supp. 202, 219 (D.Mass.1993), rev'd on other grounds, 49 F.3d807 (1st Cir.1995); and (3) the need for additional time to evaluate the extent of the infringement, A.C. Aukerman Co. v. R.L. Chaides Constr. Co., 960 F.2d 1020, 1033 (Fed. Cir. 1992).

To explain his delay in filing suit, Calhoun claims that he was unaware that "Emmanuel" existed. McGee/Assignees contend that the delay was inexcusable because Calhoun should have known about his alleged claim of infringement well before 1997, the date he claims to have "discovered" the putatively infringing and strikingly similar composition, due to the popularity of "Emmanuel" throughout the past two decades. "Emmanuel" has appeared in a number of major Christian denominational hymnals and has been translated into dozens of foreign languages. It has consistently been ranked in the top twenty requested Christian song. Calhoun worked as both a choir director and an organist for hymnals that contained the chorus "Emmanuel." Furthermore, Calhoun, himself, listed over 21 publications that included "Emmanuel" in addition to the list of 20 publications submitted by

McGee/Assignees during discovery. R1-43; R2-47, 48.

The district court found "it difficult to believe that [Calhoun] did not have notice of the allegedly infringing song prior to 1997 . . . . [H]ad [Calhoun] exercised an iota of diligence, he would have learned of the possible infringement earlier." R3-108 at 8. I agree. Given the evidence in this record no reasonable juror could have concluded that Calhoun exercised any diligence in protecting his copyright. With copyright rights come concomitant responsibilities, including the responsibility to assert those rights in a timely manner after exercise of diligence. Moreover, in the district court Calhoun argued that the two compositions were strikingly similar in melody (as opposed to lyrics), thus compelling a recognition of the putative infringement. Given the length of time that had passed, the wide dissemination of "Emmanuel," and his substantial experience and involvement with church music, Calhoun should have known about "Emmanuel," and therefore, the delay of filing suit was inexcusable.

3. *Prejudice*

The final factor informing the decision to bar by unreasonable delay is whether McGee/Assigns have been prejudiced by Calhoun's delay. In similar contexts courts have recognized a variety of factors that constitute prejudice: (1) important witnesses have died; (2) the memories of witnesses have been dulled; (3) relevant records have been destroyed or are missing; and (4) the loss of monetary investments which likely would have been prevented by earlier suit. Eastman Kodak Co. 916 F.2d at 1326. See Jackson v. Axion, 25 F.3d 884 (9th Cir. 1994); Byron v. Chevrolet Motor Div. of General Motors Corp. 1995 WL 465130 (S.D.N.Y. 1995). Cf. Hoste v. Radio

Corporation of America, 654 F.2d 11 (6th Cir. 1981). Calhoun admits that he song "Emmanuel" may not have become as widespread as it is today had he objected sooner. As McGee/Assigns point out, since 1984, C.A. Music has licensed "Emmanuel" to hundreds of licensees, 28 of whom make up the assigns in this case. McGee's assigns have invested a substantial amount of time and money in the licensing of "Emmanuel" by relaying on the validity of its copyright. Accordingly, McGee/Assigns are able to demonstrate prejudice by showing that they suffered consequences that they would not have, had Calhoun acted promptly.

While the foregoing analysis is not required for a resolution of this dispute, perhaps my rumination may be useful to those confronted with this intriguing copyright scenario in the future.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

RONALD G. CALHOUN,	)	Filed K. Stepler
Plaintiff,	)	
v.	)	**Case No. CV 499-159**
NAZARENE PUBLISHING HOUSE,	)	
Defendant	)	

RONALD G. CALHOUN,	)	
Plaintiff,	)	
v.	)	**Case No. CV 400-086**
THE SOUTHERN BAPTIST CONVENTION LIFEWAY CHRISTIAN RESOURCES, THE SUNDAY SCHOOL BOARD OF THE SOUTHERN BAPTIST CONVENTION, CONVENTION PRESS, BROADMAN & HOLMES, BAPTIST BOOK STORES, THE UNITED METHODISTPUBLISHING HOUSE, COKESBURY PUBLISHING, ABINGDON PRESS, COKESBURY STORES, WORD MUSIC, and C.A. MUSIC,	)	
Defendants.	)	

ORDER

Before the Court are defendants' motions for summary judgment (Docs. 64/92, 66/94, 67, 72 and 85). Based upon the arguments of the parties and a thorough review of the record, defendants' motions for summary judgment are granted for the reasons fully explained below.

I. STATEMENT OF FACTS

Because of the voluminous nature of this case, the Court will briefly summarize only the facts necessary for the current motions.

Plaintiff contends that he wrote the song "Before His Eyes" in 1969 and that the song "Emmanuel" is an infringement of his song. Pl.'s Statement of Material Facts at 2 (Doc. 80). Bob McGee wrote the song "Emmanuel" in 1976. Third-Party Def. C.A. Music, Inc.'s Mem. Supp. Mot. Summ. J. at 3 (Doc. 68). In 1983, C.A. Music acquired the copyright in "Emmanuel" and began to license the song to dozens of companies. Id. at 2. Plaintiff brought this suit against these companies based on alleged violations of various state and federal laws, including a claim of copyright infringement. Compl. (Doc. 1) at 1-14.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment serves to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56 advisory committee's note, cited in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 487 (1986). It is appropriate only when the pleadings, depositions and affidavits submitted by the parties indicate no genuine issue of material fact and show that the moving party is entitled to

judgment as a matter of law. FED. R. CIV. P. 56(c). A court must view the evidence and any infernences that may be drawn from it in the light most favorable to the nonmovant. Mercantile Bank & Trust Co., Ltd. v. Fidelity & Deposit Co., 750 F.2d 838, 841 (11th Cir. 1985).

The party seeking summary judgment must first identify the grounds demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1583 n. 16 (11th Cir. 1991), cert. denied, 506 U.S. 903 (1992). Such a showing shifts to the nonmovant the burden to go beyond the pleadings and present affirmative evidence showing that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986); Thompson, 934 F.2d at 1583 n. 16. "Factual disputes that are irrelevant or unnecessary will not be counted." United States v. Gilbert, 920 F.2d 878-83 (11th Cir. 1991) (citation omitted), and a mere scintilla of evidence supporting the non movant's position will not fulfill this burden. Walker v. Darby, 911 F. 2d 1573, 1577 (11th Cir. 1990).

III. COPYRIGHT INFRINGEMENT

To state a claim for copyright infringement, plaintiff must prove two elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1214 (11th Cir. 2000): Beal v. Paramount Pictures Corp., 20 F.3d 454, 459 (11th Cir. 1994), cert. denied, 513 U.S. 1062 (1994); Bellsouth Adver. & Publ'g Corp. v. Donnelly Info Publ'g, Inc., 999 F. 2d 1436, 1440 (11th Cir. 1993) (en banc). If plaintiff does not have direct proof of copying, the plaintiff "may show copying by demonstrating that the defendants had access to the

copyrighted work and the works are 'substantially similar.'" Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1248 (11th Cir. 1999) (quoting Benson v. Coca-Cola Co., 795 F. 2d 973, 974 (11th Cir. 1986) reh'g denied, 801 F. 2d 404 (11th Cir. 1986) (en banc). If the plaintiff cannot show access, the plaintiff may still prevail by demonstrating that the works are "strikingly similar." Herzog, 193 F.3d at 1248 (quoting Ferguson v. Nat'l Broad. Co., 584 F.2d 111,113 (5th Cir. 1978)).[1] However, proof of access and similarity "only raise a presumption of infringement which may be rebutted by proof of [defendants'] independent creation of the allegedly infringing song." Ferguson, 584 F.2d at 974.

Because it is "virtually impossible to prove copying directly, this element is usually established circumstantially, by demonstrating that the person who composed the defendant's work had access to the copyrighted material and that there is substantial similarity between the two works." Herzog, 193 F. 3d at 1249; Ferguson, 584 F.2d at 113. Once the plaintiff makes this showing, the "burden shifts to the defendant to prove that his/her work was not a copy, but rather was an independent creation." Herzog, 193 F.3d at 1249. See also Benson, 795 F.2d at 974 (stating that "proof of access and similarity [are]not enough, however, to affirmatively establish infringement. These elements only raise a presumption of infringement which may be rebutted by proof of appellee's independent creation of the allegedly infringing song.").

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[1] Fifth Circuit decisions prior to September 30, 1981 are binding precedent in the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

A. ACCESS

The Eleventh Circuit regards a "reasonable opportunity to view" as access. Ferguson, 584 F.2d at 113. "Reasonable opportunity does not encompass any bare possibility in the sense that anything is possible." 4 MELVILLE B. NIMMER AND DAVID NIMMER ON COPYRIGHT, § 13.02[A], at 13-19 (1999). "Access may not be inferred through mere speculation or conjecture." Id.; Ferguson, 584 F.2d at 113. "There must be a reasonable possibility of viewing plaintiff's work-not a bare possibility." Herzog, 193 F.3d at 1250 (internal quotations omitted).

Plaintiff proffers three theories in his attempt to establish that Mr. McGee had a reasonable opportunity to view "Before His Eyes." First, plaintiff alleges that he taught students from the state of Washington while he was an instructor at the Stamps-Blackwood School of Gospel Music in Kentucky and that one or more of these students procured his music and made it available to Mr. McGee. Calhoun Dep. at 110. Second, plaintiff contends that Mr. McGee heard plaintiff perform "Before His Eyes" on the radio, television or at a performance. Calhoun Dep. at 110; Pl.'s Memo Supp. Req. Deny Mot. Summ. J. (Doc. 79) at 8. Lastly, plaintiff asserts that Mr. McGee had access to "Before His Eyes" because plaintiff sent his works to Faith Music Company, which Lillenas Publishing Company purchased around 1975. Doc. 79 at 9.

i. First Theory of Access—Students at Stamps-Blackwood School

Plaintiff was an instructor at the Stamps-Blackwood School of Gospel Music in Murray, Kentucky from 1972 to 1976 or 1977. Pl's Opp'n Answer Material Facts Statement (Doc. 83) at 8; Pl's

Br. Resp. Renewed Mot. Dismiss Summ. J. (Doc. 104/73) at 9. The Stamps-Blackwood School was not a full time school, but was open in the summers for three weeks. Calhoun Dep. at 112. Plaintiff claims that he taught students from the state of Washington while serving as an instructor at this school. Doc. 80 at 4. Plaintiff theorizes that a student from the state of Washington who attended the Stamps-Blackwood School could have procured a copy of his music and returned to the King's Temple Church in Washington and shared it with Mr. McGee. Calhoun Dep. at 110. As evidence, plaintiff provides seven names and seven address of "students from the state of Washington that he taught from 1972 to 1976." Doc. 104/73 at 9. However, plaintiff does not indicate whether these seven individuals resided in Washington when he allegedly taught them during the 1972-76 time period. Plaintiff has not offered an affidavit from any of these seven individuals to substantiate his claim nor has he offered a scintilla of evidence linking any of these individuals to Mr. McGee or to anyone involved with King's Temple Church.

This theory is further weakened by Mr. McGee's statement that "no external sources influenced [his] conception and composition of the song" and that he "did not use any sheet music [or] lead sheets." McGee Decl. (Doc 50) at 3. Plaintiff has not proffered a single piece of evidence to rebut Mr. McGee's declaration and thus, has not created a genuine issue of material fact.

ii. Second Theory of Access—Broadcasts and Performances

Plaintiff contends that access can be inferred from the wide distribution of "Before His Eyes." Doc. 104/73 at 8-10. Plaintiff performed "Before His Eyes" on television three times. Calhoun Dep. at 76. He performed "Before His Eyes" on *The Warren Roberts Presents Show* once in October of 1972 and again in

September 8, 1975, which was broadcast on WHAE TV, Channel 46 in Atlanta, Georgia. Calhoun Dep. at 73. On October 6, 1972, plaintiff performed "Before His Eyes" on *The 700 Club*, which was broadcast from Portsmouth, Virginia. Calhoun Dep. at 74. Plaintiff alleges that these three performances were not local broadcasts and that all the CBN affiliate stations aired the performances. Calhoun Dep. at 75-76.

Plaintiff, however, has provided no admissible evidence to show that these three performances were aired outside of Atlanta and Portsmouth, respectively. Calhoun Dep. at 76, 216 (stating that plaintiff does not know what television stations were affiliates of the CBN network during the time of his performances). The singular piece of evidence offered by plaintiff is a letter dated October 6, 1972 from Mr. William A. Garthwaite, producer of *The 700 Club*. Doc. 80 at Exhibit L. Mr. Garthwaite explains that "*The 700 Club* goes into Calif., Conn., North Carolina, Baltimore, Md., Roanoke, Va., and Portsmouth, Va. and in Atlanta. In addition to this, the program is carried by cable into many other areas such as Florida, Louisiana, etc." Id. Most notably, Mr. Garthwaite's letter does not indicate that *The 700 Club* was available in any part of the Pacific Northwest region of the county. Furthermore, Mr. McGee stated in his declaration that he had "never seen nor heard of the televised program *'Warner Robbins presents'* . . . [and] had never seen the televised program *'The 700 Club'*" prior to writing "Emmanuel" in 1976. McGee Decl. at 4. Plaintiff has provided no evidence to refute this testimony nor has he produced any evidence that Mr. McGee visited any of these places of performance or broadcasts during the relevant time period.

Plaintiff further contends that "Before His Eyes" "was performed and promoted over radio stations, at concerts, in churches, to record companies and over The Grand Ole Opry Gospel Radio which was syndicated from Nashville, Tennessee." Doc. 83 at 8.

Again, however, plaintiff has failed to proffer evidence to support these conclusory statements that his song was accessible in the state of Washington or the Pacific Northwest. See Ferguson, 584 F. 2d at 114 (stating that such conclusory statements "are not probative evidence in a summary judgment proceeding").

For example, plaintiff offered a letter dated September 28, 2000 from Kyle Cantrell, the Operations Manager of WSM, the radio channel that broadcasts The Grand Ole Opry Gospel Radio. Doc. 104/73 at Exhibit B. In this letter, Mr. Cantrell explains that:

> While WSM's signal has been heard on every continent, the primary area in which its skywave signal has been reliably received has historically been within 1,000 to 1,500 miles of Nashville [Tennessee]. Reception of WSM in Washington state, therefore, while possible from time to time, is not likely to have occurred in the 1970s on anything resembling a consistent basis. Id.

Further, Mr. McGee stated in his declaration that he "had never heard the radio program *The Grand Ole' Opry Gospel Hour.'*" McGee Decl. at 4. Plaintiff has provided no evidence to refute this testimony.

While plaintiff claims that "Before His Eyes" received widespread publicity, the evidence does not support this assertion. Plaintiff registered "Before His Eyes" and several of his other songs with the performing rights agencies of SESAC and BMI, and he has only received in his entire musical career less

than eleven dollars ($11) in performing rights and song publishing royalties for all of his music. Calhoun Dep. at 39-40, 62. This fact strongly suggests that "Before His Eyes" has not received much airplay. Further, plaintiff paid for the album "It's Through Our Faith," the album on which "Before His Eyes" appears, and only 1200 copies of the album were produced. Calhoun Dep. at 55. Small quantities were promoted and distributed to publishers and associates in the music business. Calhoun Dep. at 55. However, plaintiff has no records of any royalties received from sales of this album. Doc. 69 at 3.

The Second Circuit has recognized that a plaintiff may establish access by proving that there has been "wide dissemination" of the copyrighted work. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F2d 988, 998 (2d Cir. 1983) (finding access where plaintiff's song was "Number One" on the United States Billboard Charts and one of the "Top Thirty Hits" in England). Where the copyrighted work has only been published to a limited audience, however, access cannot be inferred absent evidence that the defendants has a reasonable opportunity to view the work. See Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 281 (S.D.N.Y. 1991) (dismissing plaintiffs' claim of radio access where there was no proof that the defendants' songwriters heard the song); Novak v. Nat'l Broad. Co., 752 F. Supp. 164, 170 (S.D.N.Y. 1990) (holding that no genuine issue of fact regarding access despite fact that plaintiff's skits were broadcast several times on a national television show); Jewel Music Pub. Co. v. Leo Feist, Inc., 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (finding no access to plaintiff's song despite the fact that 4,000 copies were distributed to various broadcasting stations and artists, and 5,626 copies, 168 orchestrations and 198 band arrangements were sold); see also Benson, 795 F.2d at 975 (finding fact that plaintiff had performed his song around the country did not establish access

where no evidence that defendant's songwriters visited any of the places or performance during the relevant time period); Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) (finding no more than a bare possibility that defendants had access to the plaintiff's song where song had been performed two or three times in the Chicago area and sent to eleven publishing companies); Jason v. Fonda, 526 F. Supp. 774, 776-77 (C.D. Cal 1981) (indicating that fact that 200 to 700 copies of plaintiff's book were available in Southern California bookstores "creates no more than a 'bare possibility' that defendants may have access to plaintiff's book"), aff'd, 698 F. 2d 966 (9th Cir. 1982).

In sum, plaintiff has presented no evidence that "Before His Eyes" was ever played or broadcast in the Pacific Northwest between 1969, the time plaintiff wrote the song, and 1976, the time Mr. McGee wrote "Emmanuel." Furthermore, Mr. McGee stated that he "was not in the habit of listening to gospel music on any radio stations or television programs...[and] did not listen to recordings of Christian music" prior to 1976. McGee Decl. at 3. He "had never listened to Christian music on the radio before composing 'Emmanuel' ...[and] had never heard or seen 'Before His Eyes' or had any contact with that song whatsoever before creating 'Emmanuel.'" McGee Decl. at 3-4. Plaintiff has provided no evidence to refute this testimony.

Lastly, plaintiff has not produced any evidence that Mr. McGee heard "Before His Eyes" during one of plaintiff's performances in a church or at a concert. In fact, Mr. McGee stated that he "had never traveled to the Southeast United States," had "never been to any Baptist revivals," and had "never heard of Ronald G. Calhoun" until this lawsuit. McGee Decl. at 4. Again, plaintiff has provided no evidence to refute this testimony.

The following exchange during plaintiff's deposition summarizes the plaintiff's theory of access:

> Q: How do you contend that Mr. McGee got access to your material?
> A: My personal feeling is that he could have heard it over the CBN performances. He could have possibly attended the Stamps-Blackwood School of Music. Students came to the Stamps-Blackwood School of Music from all over the United States and other parts of the world. And there could have been someone from the King's Temple take the music back to the King's Temple that attended the Stamps-Blackwood School of Music.
> Q: But all this is conjecture. You don't have any evidence-
> A: I don't have any evidence to prove that other than where I was during the span of time prior to 1976 when they-the King's Temple claims rights to their chorus book.

Calhoun Dep. at 110

iii. Third Theory of Access--Third Party

Plaintiff claims that he sent "Before His Eyes" to Faith Music Company between 1970 and 1971. Doc. 79 at 9. Lillenas Publishing Company acquired Faith Music Company around 1975. Id. Plaintiff alleges that Mr. McGee had dealings with Lillenas and that Lillenas's alleged possession of his song is sufficient to establish access. Doc. 140/73 at 8.

The Fourth Circuit faced this issue in Towler v. Sayles, 76 F.3d 579, 582 (4th Cir. 1996). The Fourth Circuit held that "[a] mere possibility that an opportunity for [the infringer] to view or copy plaintiff's work could have arisen will not suffice. Rather, it must be reasonably possible that the paths

of the infringer and infringed work crossed." Id. at 582. The Court went on to state that "[a] court may infer that the alleged infringer had a reasonable possibility of access if the author sent the copyrighted work to a third party intermediary who has a close relationship with the infringer" and explained that "an intermediary will fall within this category, for example, if she supervises or works in the same department as the infringer or contributes creative ideas to him." Id. at 583. See also Herzog, 193 F.3d at 1252 (stating that "an inference of access based on a third party's possession of the plaintiff's work requires 'more than a mere allegation that someone known to the defendant possessed the work in question.'" (quoting Palmieri v. Estefan, No. 91 CIV-3098-RO, 1995 WL 331719, at *1 (S.D.N.Y. June 5, 1995) aff'd sub nom, on other grounds, Palmieri v. Defaria, 88 F.3d 136 (2d Cir. 1996)); Evans v. Wallace Berrie & Co., 681 F. Supp. 813, 816 (S.D. Fla. 1988) (rejecting suggestion that a reasonable possibility of access arose where a channel of communication was established between a person to whom plaintiff submitted her work, a third party, and the alleged infringer).

After scouring the record, the Court cannot find any connection between Mr. McGee and Lillenas. Mr. McGee's statement that he had "never had any relationship with any music publishers" prior to 1976 explains this void. McGee Decl. at 4. Therefore, plaintiff cannot prove access based on this third theory.

In order to conclude that Mr. McGee had access to plaintiff's song, this Court would have make several factual and logical leaps that are contrary to the record before the Court. For example, this Court would have to assume without any supporting evidence that one of plaintiff's students procured a copy of "Before His Eyes," gave it to Mr. McGee, and that Mr. McGee was not truthful when he said he had never heard of plaintiff's composition. Similarly, the

Court would have to assume, despite evidence to the contrary, that "Before His Eyes" enjoyed vast popularity in both television and radio broadcasts in the state of Washington in the early 1970s and that Mr. McGee's testimony that he did not see nor hear the song was a fabrication. Therefore, given the lack of evidence presented by plaintiff, a finding of access would be based on "impermissible speculation or conjecture," which is specifically disallowed by the Herzog decision. Herzog, 193 F.3d at 1256. In sum, no nexus exists between plaintiff and Mr. McGee that is sufficiently strong to raise a reasonable possibility of access to "Before His Eyes." Herzog, 193 F.3d at 1251; see also Ferguson, 584 F.2d at 113 (stating that "to support a finding of access there must be a reasonable possibility of access and not a bare possibility . . . .").

The Court finds that the Ferguson case is analogous to plaintiff's claims. Ferguson, 584 F2d at 111. In Ferguson, the plaintiff alleged that certain portions of her musical composition "Jeannie Michele" were used in the theme song of a television program aired in 1973 called "A Time to Love." Id. at 112. The various individuals and companies to whom she sent her composition, including NBC and BMI, rejected her work. Id. She filed a copyright infringement complaint against NBC, the network which aired the show, John Williams, the musician who composed the allegedly infringing theme song, and others. Id. The district court dismissed Mr. Williams for lack of personal jurisdiction, and NBC moved for summary judgment. Id, at 112-13. In support of its motion, NBC submitted Mr. Williams's affidavit which stated that Mr. Williams had never heard of the plaintiff nor her composition. Id. at 113. Plaintiff offered no evidence to contradict Mr. Williams's statements. Id. The district court granted NBC's motion for summary judgment and the Fifth Circuit affirmed, holding:

> To find that Williams had access, we would have to assume that (1) although BMI professed no interest in plaintiff's composition and returned the original to her, it made and kept a copy which is later allowed Williams to see, and (2) Williams was lying when he said he had never heard of the of the plaintiff's composition. Plaintiff has given us no reason to believe that either of these assumptions is true, and certainly they are not obviously compelling. Thus, a finding of access in this case would be based on speculation or conjecture, and this is impermissible.

584 F.2d at 113.

Based upon the foregoing, the Court finds that plaintiff has failed to prove that Mr. McGee had a reasonable possibility to view plaintiff's work. Having failed to prove access, plaintiff cannot establish a prima facie case for copyright infringement rendering discussion of the substantial similarity prong is moot.

IV. STRIKING SIMILARITY

Even without proof of access, plaintiff could still establish his claim of copyright infringement if he showed that the two works were not just substantially similar, but were so strikingly similar as to preclude the possibility of independent creation. Ferguson, 584 F.2d at 113. The former Fifth Circuit articulated this Circuit's rule of striking similarity in Ferguson, 584 F.2d at 113. In Ferguson, the Court held "[e]ven without proof of access, plaintiff could still make out her case if she showed that the works were not just substantially similar, but were so strikingly similar as to preclude the possibility of independent creation."

Id. (citations omitted). See also Herzog, 193 F.3d at 1249 (indicating that when a plaintiff fails to demonstrate access, plaintiff could still prevail by demonstrating that the works are so strikingly similar as to preclude the possibility of independent creation); Benson, 795 F.2d at 975 n.2 (indicating that striking similarity is similarity "so great it precludes the possibility of coincidence, independent creation or common source."); Evans, 681 F. Supp. at 818 (stating that "[s]triking similarity simply means that in human experience it is virtually impossible that the two works could have been independently created.") (citations omitted).

This rule is the "clear majority rule, adopted in such cases as Gaste v. Kaiserman, 863 F.2d 1061 (2nd Cir. 1988), which involved the well-known song 'Feelings.'" McRae v. Smith, 968 F. Supp. 559, 565 (D. Colo. 1997). In Gaste, the Second Circuit stated:

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation. . . . Thus, striking similarity between pieces of popular music must extend beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions.

Gaste, 863 F.2d at 1068-69.

Courts have interpreted the striking similarity standard "very stringently." McRae, 968 F. Supp. at

566. See Hofmann v. Pressman Toy Corp., 790 F. Supp. 498, 509 (D.N.J. 1990) (holding that two works would have to be virtually identical to meet this standard); Evans, 681 F. Supp. at 808 (stating that plaintiff has an "exacting burden" to prove striking similarity). Application of this stringent standard is particularly true in cases where courts have examined popular music because songs in this genre are relatively short and tend to build or repeat a basic theme. Benson, 795 F.2d at 973 n.2; Selle, 741 F.2d at 903 n.3; McRae, 968 F. Supp. at 566. When determining whether two works are strikingly similar, the Second Circuit stated that "[i]n assessing this evidence, we are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently appear in various compositions, especially in popular music." Gaste, 863 F.2d at 1068.

Local Rule 26.3(B)(6) mandates that all parties comply with Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure regarding the submission of a written expert report and states that such "reports must be furnished to opposing counsel and file within ninety (90) days after the filing of the last answer of the defendants named in the original complaint." Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure indicates that a party who wishes to utilize expert testimony must submit:

> [A] written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all

> publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(B).

While plaintiff repeatedly refers to the testimony of his "experts," he only attempted to comply with either Local Rule 26.3(B)(6) or Rule 26(a)(2)B) of the Federal Rules of Civil Procedure with Ms. Beth Tolliver. See Expert Witness Report (Doc. 30). Accordingly, this Court will not consider the statements of plaintiff's other witness as expert testimony.

In addition, even though plaintiff at least attempted to comply with the rules for filing an expert witness report for Ms. Tolliver, that report also fails to meet the standard required by Local Rule 26.3(B)(6) and Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. First, Ms. Tolliver did not sign the report. Rather, the signature of Ms. Tolliver appears on some personal correspondence-a letter from Ms. Tolliver to plaintiff-which plaintiff attached to the report. Second, the report does not include her qualifications nor a list of publications. Third, it does not reveal whether she was to receive compensation or in what amount. Lastly, the report does not indicate the other cases in which she has testified at trial or by deposition. Therefore, because this report fails to comply with Local Rule 26.3(B)(6) and Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure this Court cannot consider it as expert testimony.

Even if this Court were to consider statements of plaintiff's witnesses as expert testimony, plaintiff

would still fail to prove that the two works are strikingly similar. First, all of these individuals fail to filter out the nonprotectable components of the songs from the original expression that is protectable, as required by MiTek Holdings, Inc. v. Arce Eng'g Co., 89 F3d 1548, 1650 (11th Cir. 1996).

Second, while plaintiff's witnesses opine that the songs are strikingly similar or so similar as to preclude independent creation (See Doc. 104/73 at Exhibit A and Doc. 30), an issue of fact cannot be created by merely reciting the magic words "strikingly similar" and "no possibility of independent creation." McRae, 968 F. Supp. at 567. Plaintiff has not come forward with specific evidence that, filtering out the common and nonprotectable elements of these songs, they are so strikingly similar as to preclude independent creation.

As an initial matter, the lyrics are completely different. "Before His Eyes" is also considerably longer than "Emmanuel." "Before His Eyes" is in the key of F, while "Emmanuel" is in the key of C flat. Defs.' Material Facts (Doc. 69) at 4. At least 10 out of 32 notes in the melody line are different. Id. Considering that there are only seven melody notes from which to choose in a chorus, some similarity is practically inevitable. "Before His Eyes" contains an unique octave leap in the chorus, which does not appear in "Emmanuel." Calhoun Dep. at 103-04.

In contrast, in Gaste, the court found the following evidence of striking similarity:

> Gaste's expert testified not merely to common musical phrases in the songs but said that "there is not one measure of 'Feelings' [the allegedly infringing work] which . . . cannot be traced back to something which occurs in 'Pour Toi' [the allegedly original work]." He also pointed to a unique musical

> "fingerprint"-an "evaded resolution"-that occurred in the same place in the two songs. The witness said that while modulation from a minor key to its relative major was very common, he had never seen this particular method of modulation in any other composition.

Gaste, 863 F.2d at 1068 (footnotes omitted).

In this case, plaintiff has not provided such evidence of similarities of an unusual musical fingerprint that is not common to other songs. Further, plaintiff has not provided this Court with evidence of a measure by measure similarity aside from the similarities common to the genre or to church hymns in general. In short, plaintiff's evidence does not meet the strict standard set for showing that two works are strikingly similar.

At this summary judgment stage, the Court is charged with determining whether there is sufficient evidence to go to the jury on the issue of striking similarity. McRae, 968 F. Supp. at 567. The Court concludes that there is insufficient evidence that could, if believed by the jury, establish such striking similarity that access could be inferred in the absence of any actual evidence of access. See Ferguson, 584 F.2d at 114 (stating that [i]n truth the plaintiff fails to establish mimicry. A few notes do not a song make.") The evidence presented clearly does not raise a question of fact as to whether the two compositions were so strikingly similar as to preclude the possibility of independent creation.[2]

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[2] Considering the exceedingly high standard' for determining if works are strikingly similar, plaintiff appears to sabotage his own case. In his "Brief to Plaintiff in Support of Striking Similarity" (Doc. 78/110), plaintiff points out four differences that he found in "Emmanuel" that are not

V. INDEPENDENT CREATION

If a defendant can prove that he independently created a work, then he has negated any claim of infringement. Benson, 795 F.2d at 975 (holding that the uncontradicted testimony of the writers of the allegedly infringing song was sufficient to prove independent creation, fully negating plaintiff's claim of copyright infringement). "If defendant offers evidence of the independent creation, the plaintiff has the burden of proving that the defendant in fact copied the protected material." Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1375 (5th Cir. July 1981).

Mr. McGee stated in his affidavit that he "independently created 'Emmanuel' during [a] church service in May or June 1976. [He] did not use any pre-existing material as a basis for the song. [He] did not use any sheet music, lead sheets or hymnals." McGee Decl. at 3. Further, Mr. McGee asserted that "no external sources influenced [his] conception and composition of the song." Id.

Plaintiff has not contradicted this testimony and as indicated above, plaintiff bears the burden of proving that Mr. McGee did, in fact, copy plaintiff's song. Miller, 650 F.2d at 1375. Because plaintiff has offered no evidence to the contrary, no genuine issue of fact exists. Therefore, Mr. McGee's testimony constitutes uncontradicted evidence of independent creation, which fully negates any claim of infringement.

Because the Court has found that defendants have shown that there is no genuine issue of fact

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present in "Before His Eyes." Id. at 17. Furthermore, in his conclusion, he illustrates several more differences. Id. at 17018. Therefore, these two works cannot be said to be virtually identical, the standard plaintiff must meet to prove that these works are strikingly similar.

regarding access, the striking similarity of the two songs, and the question of independent creation, plaintiff has failed to meet his burden in opposing defendant's motions for summary judgment. Having failed to establish a prima facie case of copyright infringement, plaintiff's remaining claims must also fail.

Accordingly,

IT IS HEREBY ORDERED that defendant's motions for summary judgment (Docs. 64/92, 66/94, 67, 72 and 85) are granted.

IT IS FURTHER ORDERED that all remaining motions are moot.

/s JOHN P. NANGLE
UNITED STATES
DISTRICT JUDGE

Dated: February 20, 2001

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-11413-GG	Filed, U.S. Court of Appeals Eleventh Circuit - Sept. 05, 2002 Thomas K. Kahn, Clerk

RONALD G. CALHOUN,

Plaintiff-Appellant,

versus

LILLENAS PUBLISHING,

Defendant-Third-Party Plaintiff

NAZARENE PUBLISHING
BEACON HILL MUSIC, et al.,

Defendants-Appellees,

LIFEWAY CHRISTIAN RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, f.k.a. the Sunday School Board of the Southern Baptist Convention, d.b.a. Lifeway Christian Stores, CONVENTION PRESS, et al.,

Defendants-Appellees,

C.A. MUSIC, INC.,

Third-Party-Defendant-Appellee.

No. 01-11415-GG

RONALD CALHOUN,

Plaintiff-Appellant,

versus

THE SOUTHERN BAPTIST
CONVENTION LIFEWAY CHRISTIAN
RESOURCES,
d.b.a.
Lifeway Christian Stores,
THE SUNDAY SCHOOL BOARD OF THE
SOUTHERN BAPTIST CONVENTION, et al.,

Defendants-Cross
Claimants-Appellees,

THE UNITED METHODIST
PUBLISHING HOUSE
COKESBURY PUBLISHING, et al.,

Defendants-
Appellees,

On appeal from the United States District Court for the Southern District of Georgia

BEFORE: BIRCH, CARNES and COX, Circuit Judges

PER CURIAM:

The petition for rehearing filed by Appellant, Ronald G. Calhoun is DENIED.

ENTERED FOR THE COURT:

/s STANLEY F. BIRCH, JR.
UNITED STATES CIRCUIT JUDGE

No. 02-1426

Supreme Court, U.S.
FILED
APR 28 2003
CLERK

In The
Supreme Court of the United States

RONALD G. CALHOUN,

Petitioner,

vs.

LILLENAS PUBLISHING, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question demonstrates the fundamental legal defect in Petitioner's suit:

> When there is uncontradicted evidence in a copyright infringement suit that the challenged work was independently created, and the plaintiff has failed to introduce any plausible evidence that the alleged infringer had a reasonable opportunity to view the allegedly infringed work prior to the creation of the challenged work, is the plaintiff automatically entitled to a jury trial on the issue of copyright infringement solely because the works are very similar?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents C.A. Music, Inc., The United Methodist Publishing House and Word Music (collectively "Respondents") provide the following full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to the Respondents:

Baber, Bruce W.

Bates, Donald Alan

Blood-Dickman, Erica

Beacon Hill Music

Bible, Ken

Baptist Book Stores

Broadman & Holman

Buchan, Jeffrey

C.A. Music, Inc.

Calhoun, Ronald G.

Christian Copyright License International

Cokesbury Stores

Crystal Sea Recordings

Duane Morris LLP

Faith Music

Floria, Cam

Gaylord Creative Group, Inc. dba Word Music

Herman, John C.

Integrity Church Services

Integrity Music

King & Spalding

Lifeway Christian Resources dba Lifeway Christian Stores

Lillenas Publishing Company

McGee, Robert

McKay, John H.

Maranatha Music

Mathias, John

Music Services, Inc.

Nangle, The Honorable John F.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLSOURE STATEMENT – Continued

Nazarene Publishing House

Nelson/Word Ministry Services

Phillips, Lynda

Pilot Point Music

Psalmsinger Music

Richardson, James

The Southern Baptist Convention

The Sunday School Board of the Southern Baptist Convention Press

The United Methodist Church

The United Methodist Publishing House

Tolliver, Beth

Walsh, Ryan K.

Weathers, Hardy

Williams, Mark A.

Word Music

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
I. COURSE OF THE PROCEEDINGS	1
II. STATEMENT OF FACTS	1
A. Background	1
B. The Eleventh Circuit Opinion	3
ARGUMENT	4
I. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT	4
A. Copyright Law	4
1. The General Elements of Copyright Infringement	4
2. The Doctrine of "Striking Similarity"	5
3. The Stringent Standard for the Infringement of Musical Works	5
B. Regardless of the Song's Similarity, the Plaintiff's Copyright Claim Still Fails as a Matter of Law	7
C. Calhoun's Claim Fails as a Matter of Law Because Calhoun Could Not Prove a Reasonable Possibility of Access	10
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir. 1987).....12

Benson v. Coca-Cola Co., 795 F.2d 973 (11th Cir. 1986).....*passim*

Bouchat v. Baltimore Ravens, Inc., 241 F.3d 350 (4th Cir. 2000) 10, 11, 12

Calhoun v. Lillenas Publ'g, 298 F.3d 1228 (11th Cir. 2002).....1, 2, 3, 13, 15

Calhoun v. Nazarene Publ'g House, Case No. CV 499-159 (N.D. Ga. 2001).....1, 2

Ellis v. Diffie, 177 F.3d 503 (6th Cir. 1999) 6

Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).....4, 11

Ferguson v. National Broadcast Co., 584 F.2d 111 (5th Cir. 1978) 5, 8, 14

Gaste v. Kaiserman, 863 F.2d 1061 (2d Cir. 1988).....6, 7, 11

Girl Friends Prods., Inc. v. ABC, Inc., No. 99 Civ. 1541, 2000 U.S. App. LEXIS 14931 (S.D.N.Y. Sept. 30, 2000), *aff'd*, No. 00-9466, 2001 U.S. App. LEXIS 21851 (2d Cir. Oct. 11, 2001) 7

Herzog v. Castle Rock Entm't, 193 F.3d 1241 (11th Cir. 1999).....5, 10

McRae v. Smith, 968 F. Supp. 559 (D. Colo. 1997).....5, 6

Miller v. Universal Studios, Inc., 650 F.2d 1365 (5th Cir. 1981)..... 8

Peel & Co. v. Rug Market, 238 F.3d 391 (5th Cir. 2001)..... 9

TABLE OF AUTHORITIES – Continued

Page

Proctor & Gamble Co. v. Colgate-Palmolive Co., 199 F.3d 74 (2d Cir. 1999) 7

Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) ..... *passim*

Simmons v. Western Publ'g Co., 834 F. Supp. 393 (N.D. Ga. 1993) 7

Takeall v. Pepsico, Inc., 29 U.S.P.Q.2d 1913 (4th Cir. 1993) 12, 13

Tisi v. Patrick, 97 F. Supp. 2d 539 (S.D.N.Y. 2000) 6

OTHER AUTHORITIES

MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.11[D] 7

MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.02[B] 14

STATEMENT OF THE CASE

I. COURSE OF THE PROCEEDINGS

This case involves a claim of copyright infringement asserted by the plaintiff, Ronald G. Calhoun, twenty-three years after the allegedly infringing song was created and released to the public. Calhoun's Petition for a Writ of Certiorari (the "Petition") asks whether the Eleventh Circuit Court of Appeals correctly affirmed the district court's dismissal of Robert G. Calhoun's claim for copyright infringement at the summary judgment stage. *Calhoun v. Lillenas Publ'g*, 298 F.3d 1228 (11th Cir. 2002) (Petitioner's Appendix ("Pet. App.") 1). Following the close of discovery, the district court issued a thorough 22-page order granting Respondents' motion for summary judgment, finding no copyright infringement as a matter of law. *Calhoun v. Nazarene Publ'g House*, Case No. CV 499-159 (N.D. Ga. 2001) (Pet. App. 2). The Eleventh Circuit affirmed the district court's order based on both (1) the absence of any evidentiary basis that the author of the allegedly infringing song had access to Calhoun's song "Before His Eyes"; and (2) the strong and unrefuted evidence that Bob McGee independently created the song "Emmanuel."

II. STATEMENT OF FACTS

A. Background

A minister named Bob McGee created the song "Emmanuel" in 1976 during a church service at The King's Temple Church in Seattle, Washington in the presence of several independent witnesses. These witnesses corroborated McGee's independent creation of the song during the service and the fact that McGee did so without any sheet

music, documents, or recordings of any kind. The song "Emmanuel" has been one of the most popular hymns in major Christian denominations throughout the past two decades. *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 5-6). In 1983, C.A. Music, Inc. ("C.A. Music") acquired the rights to "Emmanuel."

The Petitioner, Ronald Calhoun wrote the song "Before His Eyes" in 1969 while living in Georgia. This song appeared on a vanity album for which Mr. Calhoun paid Charisma Records over $2,000 to record and ship him copies in 1971. He has no records of any royalties received from his efforts to sell this album and has only received a total of $11 for all of his song publishing and performing rights royalties in his entire musical career. *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 4-5). The Eleventh Circuit, like the district court, found that "the evidence does not support Calhoun's claim that 'Before His Eyes' received widespread publicity." *Id.* at 13.

The district court and the Eleventh Circuit found that Bob McGee, when he wrote "Emmanuel" in 1976, had no actual access or reasonable opportunity to view Appellant's song "Before His Eyes." *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 13); *Calhoun*, Case No. CV 499-159 (Pet. App. 2 at 15). This finding is well supported in the record. So, too, is the finding that "Emmanuel" was independently created.

At the time that Bob McGee independently created the song "Emmanuel" in Seattle, Washington, the song "Before His Eyes" had probably not made it out of the Southeastern United States, and certainly not to the Pacific Northwest. McGee wrote "Emmanuel" without ever having seen or heard of Mr. Calhoun or his song "Before His Eyes."

B. The Eleventh Circuit Opinion

With respect to the songs "Emmanuel" and "Before His Eyes," the Eleventh Circuit did *not* make a legal finding of "striking similarity," which is a legal term of art. Instead, the Eleventh Circuit held that the songs were "practically identical." *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 9). Although this distinction may seem trivial, the difference in phrasing is significant, as a legal finding of "striking similarity" has a specific meaning in copyright jurisprudence that was clearly not reached by the Eleventh Circuit's holding. Indeed, the Eleventh Circuit's finding of independent creation implicitly demonstrates that the works are not "strikingly similar."

The Eleventh Circuit also held that:

> Given the limited number of musical notes (as opposed to words in a language), the combination of those notes and their phrasing, it is not surprising that a simple composition of a short length might well be susceptible to original creation by more than one composer.

Id. The Eleventh Circuit further emphasized that this statement is particularly true with respect to certain genres of music, like church music, and that the work at issue here was just a basic melody without lyrics, harmonic background, or accompaniment. *Id.* at 9 n.8. As a result, the Eleventh Circuit held that the alleged similarity between the songs did not necessarily evidence copying by McGee.

ARGUMENT

I. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S DECISION TO GRANT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Court should deny Calhoun's Petition because it is based on a contortion of copyright law and factual assertions contradicted by the record. First, the uncontradicted evidence of McGee's independent creation of the song "Emmanuel" is easily sufficient to negate Calhoun's claim of copyright infringement as a matter of law, regardless of any alleged similarities between the songs. Second, Calhoun has failed to introduce any plausible evidence that McGee had access to "Before His Eyes" prior to the creation of "Emmanuel" in 1976, so Calhoun cannot meet any reasonable standard of access. Accordingly, the Eleventh Circuit's decision to affirm the district court's decision was appropriate in light of the general principles of copyright law, and Calhoun's Petition should be denied.

A. Copyright Law

1. The General Elements of Copyright Infringement

To prove a claim of copyright infringement, a plaintiff must show that he has ownership of a valid copyright in a work and that the defendant copied the "constituent elements of the copyrighted work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Where, as here, the plaintiff has no evidence of actual copying, he must instead show that his copyrighted work is substantially similar to the defendant's alleged infringing work and that defendant had access to plaintiff's

copyrighted work. *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1248 (11th Cir. 1999). If a plaintiff cannot show actual access to the copyrighted work, a plaintiff can instead demonstrate that the defendant had a "'reasonable opportunity to view'" the copyrighted work to constitute access. *Id.* at 1249 (citation omitted).

2. The Doctrine Of "Striking Similarity"

If a plaintiff cannot show actual access or a reasonable opportunity to view the copyrighted work, courts have permitted a plaintiff to create an inference of copying and access circumstantially by showing that the two works are "so strikingly similar as to preclude the possibility of independent creation." *Ferguson v. National Broadcast Co.*, 584 F.2d 111, 113 (5th Cir. 1978). The Eleventh Circuit has described striking similarity as "when the similarity is so great **it precludes the possibility of coincidence, independent creation or common source.**" *Benson v. Coca-Cola Co.*, 795 F.2d 973, 975 n.2 (11th Cir. 1986) (emphasis added); *see also Herzog*, 193 F.3d at 1248-49 (describing striking similarity). Since the striking similarity test is an evidentiary short-cut to show copying, courts have held that the striking similarity test is a stringent requirement. *See, e.g., McRae v. Smith*, 968 F. Supp. 559, 567 (D. Colo. 1997) (court analyzes doctrine of striking similarity in the context of an infringement claim based on country music songs).

3. The Stringent Standard For The Infringement Of Musical Works

Copyright cases involving music are generally more scrutinized by courts than standard copyright infringement

cases, especially when they involve simple songs in popular styles. The Second Circuit has noted that a court must be "mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions." *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988). The Eleventh Circuit has indicated that the required degree of similarity may be higher in cases involving popular music as compared to other artistic works. *See Benson*, 795 F.2d at 975 n.2 ("striking similarity should address the uniqueness or complexity of the protected work as it bears on the likelihood of copying. . . . This is particularly important with respect to popular music, 'in which all songs are relatively short and tend to build on or repeat a basic theme.'") (citation omitted).

In applying the stringent requirement of striking similarity, numerous courts have rejected striking similarity claims in the song infringement context. *Benson*, 795 F.2d at 975 n.2; *Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999) (upholding district court's finding of no infringement because differences between songs implicitly precluded striking similarity despite the fact that the choruses of songs were substantially similar); *Selle v. Gibb*, 741 F.2d 896, 903-06 (7th Cir. 1984) (rejecting claim of striking similarity because plaintiff could not show similarity that reasonably precludes possibility of explanation other than copying due, in part, to relatively basic subject matter of pop song); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 548 (S.D.N.Y. 2000) (in granting summary judgment to defendant finding no substantial or striking similarity between songs at issue, court held that "striking similarity test . . . is applied with particular stringency in cases . . . involving popular music"); *McRae*, 968 F. Supp. at 567 (in granting

summary judgment, court found no striking similarity between two country songs when commonplace elements in country music genre were filtered out of comparison).

B. Regardless Of The Songs' Similarity, The Plaintiff's Copyright Claim Still Fails As A Matter Of Law.

Even assuming the songs at issue in this case are "strikingly similar" – which they are not – the Eleventh Circuit's holding in this case was correct and adheres to the general principles of copyright law. In copyright cases, proof of actual copying is extremely rare. MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.11[D]. As a result, courts have developed an evidentiary short-cut that allows copyright plaintiffs to create an inference of copying by establishing two elements: (1) that the works at issue are substantially similar, and (2) that the alleged infringer had access to the plaintiff's work. *Id.* Where the works at issue are found to be "strikingly similar," the court *may* infer access from "striking similarity." *Gaste*, 863 F.2d at 1068.

Even if the plaintiff establishes an inference of copying, however, a copyright defendant may *negate* any claim of infringement by proving that the allegedly infringing work was independently created. *Benson*, 795 F.2d at 975; *Proctor & Gamble Co. v. Colgate-Palmolive Co.*, 199 F.3d 74, 77-78 (2d Cir. 1999); *Girl Friends Prods., Inc. v. ABC, Inc.*, No. 99 Civ. 1541, 2000 U.S. Dist. LEXIS 14931 (S.D.N.Y. Sept. 30, 2000), *aff'd*, No. 00-9466, 2001 U.S. App. LEXIS 21851 (2d Cir. Oct. 11, 2001); *Simmons v. Western Publ'g Co.*, 834 F. Supp. 393, 396 (N.D. Ga. 1993) ("Uncontradicted evidence of independent creation **negates** a claim of infringement.") (emphasis added). Once

the defendant submits evidence of independent creation, the plaintiff has the burden of proving that the defendant actually copied the plaintiff's work. *Miller v. Universal Studios, Inc.*, 650 F.2d 1365, 1375 (5th Cir. 1981).

In the present case, C.A. Music's uncontradicted evidence of independent creation fully negates Calhoun's copyright claim, and does not simply create an issue of fact. As noted by the district court and the Eleventh Circuit, C.A. Music has introduced a significant amount of evidence demonstrating McGee's independent creation of the song "Emmanuel." For example, C.A. Music submitted an affidavit from McGee in which McGee testified under oath that he created the song "Emmanuel" in 1976 during a church service at The King's Temple Church in Seattle, Washington. C.A. Music has also introduced affidavits from individuals who witnessed McGee's creation of "Emmanuel" in 1976 and corroborated McGee's story. According to all of the affidavits, at the time McGee created the song, he had no sheet music, hymnals, records, tapes, versions or lead sheets of any other songs that he used to assist him. In addition, McGee also testified that, prior to this lawsuit, he had never heard of Calhoun or the song "Before His Eyes."

Calhoun has offered no evidence whatsoever to rebut this testimony. Instead, Calhoun now argues that the testimony from McGee and other individuals from The King's Temple Church lacks credibility and that it is unlikely that McGee could have created the song in the manner described in the affidavits.

Yet such conclusions are not probative evidence in a summary judgment proceeding. *See Ferguson*, 584 F.2d at 113 (rejecting argument that it was unlikely that defendant

could have come up with allegedly infringing song without having access to plaintiff's work). Moreover, on summary judgment, the court must give credence to the evidence supporting the moving party that is uncontradicted and unimpeached. *Peel & Co. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001). Indeed, "[t]he testimony of credible witnesses concerning a matter within their knowledge cannot be rejected without some impeachment, contradiction, or inconsistency with other evidence on the particular point at issue." *Selle*, 741 F.2d at 903.

Calhoun had ample opportunity during discovery in this case to obtain and introduce evidence that would serve to either contradict the testimony in the affidavits from The King's Temple Church or impeach the affiants themselves. Nonetheless, Calhoun did not introduce a single piece of evidence or testimony to contradict or impeach the evidence of independent creation. Calhoun's eleventh hour attempts to challenge the evidence of independent creation amount to nothing more than speculation and conjecture as to the inspiration behind McGee's creation of the song "Emmanuel." Such challenges are not only procedurally improper, *see Peel & Co. v. Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001), but they clearly do not constitute a sufficient evidentiary basis to rebut McGee's evidence of independent creation. *See Benson*, 795 F.2d at 975.

In light of C.A. Music's uncontradicted evidence of independent creation, the Eleventh Circuit's affirmance of the district court's decision in this case was justified.

C. Calhoun's Claim Fails As A Matter Of Law Because Calhoun Could Not Prove A Reasonable Possibility Of Access.

Calhoun cannot satisfy the elements necessary to create an indirect inference of copying. In order to create such an inference, a plaintiff must demonstrate that the alleged infringer had at least a reasonable opportunity to view the allegedly infringed work. *Herzog*, 193 F.3d at 1249. Bare speculation regarding possible access is not sufficient to meet the access requirement. *Id.* at 1250; *see also Selle*, 741 F.2d at 901; *Bouchat v. Baltimore Ravens, Inc.*, 241 F.3d 350, 356 (4th Cir. 2000).

In the present case, both the Eleventh Circuit and the district court found that Calhoun had failed to introduce any evidence that McGee had a reasonable opportunity to see or hear "Before His Eyes" prior to 1976. This finding is well supported by the record, which demonstrates that "Before His Eyes" received very little public exposure. Calhoun has absolutely no evidence that his song was ever played or broadcast in the Pacific Northwest between 1969 and 1976. *Id.* At the time that McGee independently created the song "Emmanuel" at The King's Temple Church in Seattle, the song "Before His Eyes" had probably not made it out of the Southeastern United States, and certainly not to the Pacific Northwest. In the absence of a reasonable possibility of access, Calhoun's claims fail as a matter of law.

Calhoun argues that this Court should endorse a sliding scale test that would allow for a lesser showing of access when the works at issue are extremely similar. Calhoun further argues that the works at issue here are very similar and that he has submitted sufficient evidence to meet this lessened standard for access.

The Eleventh Circuit, however, has never utilized such a sliding scale test in copyright cases. In fact, a sliding scale approach may not be compatible with this Court's ruling in *Feist*, which limits actionable similarities to original, protectable elements. *Feist*, 499 U.S. at 361.

More importantly, even if a minimal standard for access is appropriate, Calhoun still must present some plausible evidence showing that McGee might have had access to "Before His Eyes" before the creation of "Emmanuel." Calhoun cites the Seventh Circuit's *Selle* case as the basis for a sliding scale test, but the appellate court in that case held:

> Thus, although it has frequently been written that striking similarity **alone** can establish access, the decided cases suggest that this circumstance would be most unusual. **The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone.**

741 F.2d at 901 (emphasis added). While "striking similarity alone can raise an inference of copying, **that inference must be reasonable in light of all the evidence.**" *Bouchat*, 241 F.3d at 356 (emphasis added); *Gaste*, 863 F.2d at 1068 (Where the works at issue are found to be "strikingly similar," the court *may* infer access from "striking similarity," but it need not do so). "It is clear that a showing of striking similarity does not per se relieve the

plaintiff of his burden of establishing access."[1] *Bouchat*, 241 F.3d at 356.

The Sixth Circuit faced a similar factual situation in *Takeall v. Pepsico, Inc.*, 29 U.S.P.Q.2d 1913 (4th Cir. 1993).[2] In that case, the plaintiff entertainer alleged to have utilized a phrase in his ventriloquist act later adopted by Pepsi in a nationwide marketing campaign. Like Calhoun, Takeall's act received limited public exposure. *Id.* at 1914. Nonetheless, Takeall argued (as has Calhoun) that the two works at issue were "strikingly similar," so a lower standard of proof of access was required. *Id.* at 1915.

The Fourth Circuit assumed the works were "strikingly similar," but still rejected the plaintiff's argument. The appellate court held that, even where works are "strikingly similar," it does not per se eliminate the need for evidence of some reasonable possibility of access. *Id.* at 1916. The court further held that the limited public

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[1] There are federal circuit cases that hold that proving "striking similarity" between the works removes the requirement of also proving access. *See Baxter v. MCA, Inc.*, 812 F.2d 421, 423 n.2 (9th Cir. 1987). Yet the songs at issue here are not strikingly similar. Moreover, even if the songs are strikingly similar, the uncontradicted evidence of independent creation negates any inference of copying created by a finding of striking similarity. (*See* Section I (B), *supra*).

[2] Calhoun claims in his Petition that "there appear to be no cases from other circuits where, as here, a showing of striking similarity was made, but the issue of independent creation was decided against the plaintiff as a matter of law based upon the defendant's claim of independent creation." This is false. First, there was no finding of "striking similarity" in this case, as shown above. Second, the *Takeall* case presents just such a situation. Indeed, the Fourth Circuit rejected the exact same argument made here by Calhoun.

dissemination of the work – which appears to be more widespread than the distribution of Calhoun's work in this case[3] – was insufficient to form the basis for an inference of access.[4] *Id.* at 1916-17. In the present case, the absence of any probative evidence that there was a reasonable possibility that McGee had access to "Before His Eyes" prior to 1976 warranted the dismissal of Calhoun's claim at summary judgment.

Calhoun has also argued that he did not need to prove access because the Eleventh Circuit found that the songs at issue are "strikingly similar." This argument also fails because the Eleventh Circuit never made a legal finding of "striking similarity" in this case. Instead, the appellate court found that the two songs are "practically identical." *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 9). While seemingly trivial, this distinction is critical because a finding of

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[3] In fact, Takeall's act seems to have received greater public exposure than Calhoun's, as Takeall traveled to different areas of the country to perform.

[4] In his effort to demonstrate that McGee had access to "Before His Eyes" – which received extremely little public exposure – Calhoun consistently emphasizes that McGee, as a preacher in a "musical church," was among the most likely people to be exposed to Calhoun's music. Such statements constitute both speculation and hypocrisy. Calhoun began serving as the organist of a Methodist church in 1989. Since that time, Calhoun's Methodist church used a hymnal that contained the song "Emmanuel," one of the most popular gospel hymns during the relevant period. Nonetheless, in order to circumvent the Copyright Act's statute of limitations provision, Calhoun has maintained that he neither heard nor saw the song "Emmanuel" until 1997. As the district court pointed out, if Calhoun had used "an iota of diligence" he would have encountered the song "Emmanuel" long before. Calhoun's attempt to argue now that McGee's position in a "musical church" somehow demonstrates that McGee had access to "Before His Eyes" should therefore be ignored.

"striking similarity" can create an inference that McGee had access to "Before His Eyes," which Calhoun cannot establish through the evidence in the record.[5]

Moreover, the remainder of the Eleventh Circuit's opinion demonstrates that no finding of "striking similarity" can be inferred from the use of the phrase "practically identical." For instance, in order for two works to be "strikingly similar" in the context of a copyright infringement analysis, the works must be "so strikingly similar **as to preclude the possibility of independent creation.**" *Ferguson*, 584 F.2d at 113; *see also Benson*, 795 F.2d at 975 n.2. As one copyright treatise explained,

> [E]ven when similarity is verbatim, it may not constitute "striking similarity" if what is common to both works is commonplace, or at least sometimes found in other works. In such circumstances, the similarity between the two works may be explained by a common source, or even by coincidental similarity.

MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.02[B]. The Eleventh Circuit found that "Emmanuel" was independently created as a matter of law, implicitly rejecting any finding of "striking similarity."

In the *Benson* case, the plaintiff songwriter also tried to avoid the necessary showing of access by arguing that the songs were strikingly similar. 795 F.2d at 974-75. The

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[5] As the Seventh Circuit pointed out, the term "strikingly similar" is often used in a conclusory or circular fashion, so it can be difficult to propound a meaningful definition of the term. *See Selle*, 741 F.2d at 903.

plaintiff relied on an expert who had testified that "the works were so similar that the average listener would believe them the same." *Id.* at 975 n.2. The court rejected the plaintiff's argument that no proof of access was necessary, stating that "[the expert's] opinion does not address the crucial element of 'striking similarity': that the only possible explanation is copying." *Id.*; *see also Selle*, 741 F.2d at 904 (rejecting "striking similarity" argument where plaintiff's expert, while using the magic words "striking similarity," only ruled out the possibility of independent creation without affirmatively saying that similarities could only be the result of copying).

Likewise, the Eleventh Circuit in this case never found that the only explanation for the songs' similarities was copying by McGee. Indeed, the Eleventh Circuit found that the uncontradicted evidence in the record demonstrated that McGee had not copied the work as a matter of law, but had instead independently created "Emmanuel." Further, the Eleventh Circuit, like the appellate court in *Benson*, found that, given the simple nature of the work, "it is not surprising that a simple composition of a short length might well be susceptible to original creation by more than one composer." *Calhoun*, 298 F.3d 1228 (Pet. App. 1 at 9); *see also Benson*, 795 F.2d at 975 n.2; *Selle*, 741 F.2d at 904 (holding that "striking similarity" doctrine should be limited to works involving sufficiently unique or complex subject matter).

Because McGee did not have a reasonable opportunity to see or hear "Before His Eyes" prior to 1976, Calhoun's copyright claim fails as a matter of law. In addition, the songs at issue are not strikingly similar, and the Eleventh Circuit made no such finding. Accordingly, the Eleventh

Circuit's affirmance of the district court's decision was correct.

CONCLUSION

WHEREFORE, because the courts below have properly interpreted and applied the principles of copyright law, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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